SHDKT PROCEEDINGS AND ORDERS DATE: [10/12/90]

CASE NBR: [89107838] CSH STATUS: [DECIDED ]
SHORT TITLE: [Hamilton, Alexzene, etc. ]
VERSUS [Texas ] DATE DOCKETED: [062490]
*** CAPITAL CASE *** PAGE: [01]

| | DATE | NOTE | PROCEEDINGS & ORDERS |
|---|---|---|---|
| 1 | Jun 24 1990 | D | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| 3 | Jun 24 1990 | D | Application (A89-917) for a stay of execution of sentence of death, submitted to Justice White. |
| 4 | Jun 24 1990 | | Response to application (A89-917) filed by Texas. |
| 5 | Jun 26 1990 | | Application (A89-917) referred to the Court by Justice White. |
| 7 | Jun 26 1990 | | (A89-917) Application denied by the Court. Justice Brennan, with whom Justice Marshall joins, dissenting. Justice Blackmun and Justice Stevens dissent and would grant the application for stay. |
| 8 | Jul 5 1990 | | DISTRIBUTED. September 24, 1990 |
| 9 | Sep 13 1990 | D | Motion of Chris Lonchar Kellogg for leave to intervene filed. |
| 11 | Sep 28 1990 | | REDISTRIBUTED. October 5, 1990 |

Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [10/12/90]

CASE NBR: [89107838] CSH STATUS: [DECIDED ]
SHORT TITLE: [Hamilton, Alexzene, etc. ]
VERSUS [Texas ] DATE DOCKETED: [062490]
*** CAPITAL CASE *** PAGE: [02]

| | DATE | NOTE | PROCEEDINGS & ORDERS |
|---|---|---|---|
| 12 | Oct 9 1990 | | Motion of Chris Lonchar Kellogg for leave to intervene DENIED. Justice Souter OUT. |
| 14 | Oct 9 1990 | | The petition for a writ of certiorari is denied. Concurring opinion by Justice Marshall. Concurring opinion by Justice Stevens. (Detached opinion.) Justice Souter OUT. |

**********

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

89-7838

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ALEXZENE HAMILTON,
AS NATURE MOTHER AND NEXT FRIEND TO
JAMES EDWARD SMITH,

Petitioner;

V.

STATE OF TEXAS,

Respondent.



MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner Alexzene Smith, as natural mother and next friend to James Smith, requests leave to file the accompanying Petition for Writ of Certiorari to the Texas Court of Criminal Appeals filed with this Court June 23, 1990 without payment and otherwise to proceed in this cause as an indigent.

Petitioner submits the attached affidavit in support of this Application swearing that she does not possess sufficient means to pay for the costs of this litigation.

Respectfully submitted,

Jeffrey J. Pokorak
Member, Supreme Court Bar
Texas Bar No. 16088230

Texas Resource Center
511 West 7th St.
Austin, Texas 78701
(512) 320-8300

Counsel of Record

Alexzene Hamilton as next friend for [redacted]
Petitioner

v.

State of Texas

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Alexzene Hamilton being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ✓ No ___ $1,067.74 per mo.
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
   Indianapolis Public Schools.
   1520 E Michigan St ARSENAL TECH High School
   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes ___ No ✓
   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes ✓ No ___
   a. If the answer is yes, state the total value of the items owned. 300.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ✓ No ___
   a. If the answer is yes, describe the property and state its approximate value.
   $1,500.00

5. List the persons who are dependent upon you for support and state your relationship to those persons.
   Connie Hicks (Daughter), Jonas Davis Hamilton

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Alexzene Hamilton

Subscribed and sworn to before me this 3rd day of May, 1988

Clarissa Mendoza
Notary

My commission expires: 5-28-90

APPENDIX A

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ALEXZENE HAMILTON,
AS NATURE MOTHER AND NEXT FRIEND TO
JAMES EDWARD SMITH,

Petitioner;

V.

STATE OF TEXAS,

Respondent.



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed In Forma Pauperis was served by hand upon the Office of the Attorney General, Enforcement Division, Supreme Court Building, Austin, Texas, this 23 day of June, 1990.

Jeffrey J. Pokorak

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ALEXZENE HAMILTON,
AS NATURE MOTHER AND NEXT FRIEND TO
JAMES EDWARD SMITH,

Petitioner;

V.

STATE OF TEXAS,

Respondent.

RECEIVED
JUN 2 4 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

**THIS IS A CAPITAL CASE**

**MR. SMITH IS CURRENTLY SCHEDULED TO BE EXECUTED JUNE 26, 1990 AT 12:01 A.M.**

Ray N. Donley
Scott, Douglass & Luton
12th Floor, First City Bank
Austin, Texas 78701
(512) 476-6337

*Jeffrey J. Pokorak
Eden E. Harrington
Texas Resource Center
511 West 7th St.
Austin, Texas 78701
(512) 320-8300

*Counsel of Record
Member, Supreme Court P

## QUESTIONS PRESENTED

I. Does a death sentenced inmate's natural mother have standing to pursue claims on behalf of her son who is incompetent to forego further appeals?

II. Did the non-adversarial trial court proceeding to determine Mr. Smith's competency, that precluded contrary evidence, violate the Fourteenth Amendment?

A. Did the non-adversarial trial court proceeding violate the procedures required by Rees v. Peyton and therefore violate the Fourteenth Amendment?

B. Did the non-adversarial trial court proceeding violate the procedures required by Ford v. Wainwright, and therefore violate the Fourteenth Amendment?

C. Should this Court grant certiorari in light of its recent grant of certiorari in Perry v. Louisiana?

III. Did the state's failure to disclose critical information regarding Mr. Smith's background and mental illness render the trial court's determination of competency constitutionally unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments?



## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**





**Statutes:**



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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

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ALEXZENE HAMILTON,
AS NATURAL MOTHER AND NEXT FRIEND TO
JAMES EDWARD SMITH,

Petitioner;

V.

STATE OF TEXAS,

Respondent.

---

# PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

---

Petitioner Alexzene Smith, as natural mother and next friend to James Smith, respectfully prays that this Court issue a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

## CITATION TO OPINION BELOW

The unpublished decision of the Texas Court of Criminal Appeals, dismissing Petitioner's motion for stay of execution and petition for writ of habeas corpus, is attached as Exhibit 1.

## JURISDICTION

On June 21, 1990, Ms. Hamilton filed a Petition for Writ of Habeas Corpus and an Emergency Motion for Stay of Execution in the Texas Court of Criminal Appeals. The Court dismissed these pleadings June 22, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Texas capital sentencing statute, Tex. Code Crim. Proc., Art. 37.071.

## STATEMENT OF THE CASE

1. James Edward Smith is presently unrepresented by counsel and is scheduled to be executed at 12:01 A.M. June 26, 1990.

2. Mr. Smith is an indigent inmate incarcerated on death row at the Ellis One Unit of the Texas Department of Criminal Justice, Institutional Division, in Huntsville, Texas. He was convicted and sentenced to death in Harris County, Texas, March 24, 1984.

3. The mandatory direct appeal to the Texas Court of Criminal Appeals was filed by Mr. Randy McDonald, Mr. Smith's court appointed counsel. Mr. Smith subsequently filed a Motion

for Leave for Pro Se Representation on Appeal and Appellant's Motion to Dismiss Appeal in the trial court. These motions were both denied April 9, 1985.

4. On July 1, 1985, the trial court determined that Mr. Smith was not competent to handle his appeal. Hearing on Defendant's Motions for Leave for Pro Se Representation on Appeal and Dismissal of his Court Appointed Attorney (Motion Hearing); Exhibit 2. From the exchange between Mr. Smith and the trial court, it was evident that Mr. Smith could not articulate any rational basis for foregoing his appeal, nor for proceeding pro se. There was no indication from the record that Mr. Smith had any comprehension of what issues existed in his case, or what claims might be raised on his behalf. In fact, the 'brief' that Mr. Smith claims to have prepared states that there are no grounds for error. Motion Hearing at 10-11.

5. At this hearing, Mr. Smith vacillated wildly between wanting to file an appeal on his own behalf, and wanting to dismiss his appeal altogether. At one point, he stated both ideas in one sentence: "It is my intention to have my appeal dismissed which is my right according to the United States Constitution or to file a brief to the appellate court raising any grounds which I see." Motion Hearing at 10-11.

6. After further inquiry of an increasingly hostile Mr. Smith, the trial court denied his motion to proceed pro se on the grounds that Mr. Smith was incompetent to proceed pro se and incompetent to forego his appeal.



> THE COURT: Okay. I'm going to deny your motion for leave for pro se representation on appeal.
>
> THE DEFENDANT [MR. SMITH]: On what grounds, Your Honor?
>
> THE COURT: I am going to find that you are incompetent to represent yourself to handle this appeal. I'm going to allow Mr. McDonald to continue to handle the appeal.

Motion Hearing at 13.

7. Immediately following the court's ruling, Mr. Smith began a long and violent rant against everyone in the court. There was never any discussion by Mr. Smith of any available legal claims that he might rationally pursue himself.

8. On March 6, 1986, Mr. Smith filed a pro se Motion for Dismissal of Appeal for Failure of State to Prosecute. This motion was denied by the Texas Court of Criminal Appeals on March 6, 1986.

9. Mr. Smith's conviction and sentenced were affirmed by the Texas Court of Criminal Appeals November 12, 1987. Smith v. State, 744 S.W.2d 86 (Tex. Crim. App. 1987). Mr. McDonald filed both a Motion for Rehearing and a Motion to Stay Mandate with this Court November 24, 1987. The Motion to Stay Mandate was granted December 9, 1987. The Motion for Rehearing was denied February 23, 1988. Mr. McDonald did not continue the representation of Mr. Smith beyond his direct appeal.

10. On May 7, 1988, Ms. Alexzene Hamilton filed, as natural mother and next friend of James Edward Smith, a Petition for Writ of Certiorari and an Application for Stay of Execution in the

United States Supreme Court. Mr. Ray Donley of Austin, Texas, represented Ms. Hamilton in those proceedings.

11. In the Petition for Writ of Certiorari, previous counsel stated:

> Mr. Smith has a long history of mental problems. He was hospitalized for psychiatric evaluation in the Great Lakes Naval Hospital in 1972. In 1978 he was found not guilty of robbery by reason of insanity by a Florida state court. Mr. Smith attempted suicide in 1981 and was placed in psychiatric care at the time.
>
> * * *
>
> Mr. Smith has also had physical injuries which may contribute to his lack of competency. Mr. Smith has been involved in two auto accidents which resulted in head injuries. Mr. Smith also injured his head in a fall in Houston not long before his arrest.

Application for Stay of Execution and Petition for Writ of Certiorari at 5.

12. The Supreme Court issued a stay of execution on May 10, 1988. Hamilton v. Texas, 485 U.S. 1042 (1988). The petition for certiorari was held by that Court until April 30, 1990, when certiorari was denied. Hamilton v. Texas, ___ U.S. ___, 108 S.Ct. 1761 (1990).

13. On May 17, 1990, without notice to counsel for Ms. Hamilton, the trial court arranged for Mr. Smith to appear in open court. At that time, on the state's request, the court ordered psychiatric exams by doctors of the state's choosing. Hearing to Determine Defendant Foregoing Appeals (hereinafter Hearing); Exhibit 3.



14. The trial court began the ceremony by assuring Mr. Smith that he was not participating in an evidentiary hearing. Hearing at 5.

15. The results of this ceremony were preordained:

> I mean there's no doubt in my mind you have been mentally competent, you always been mentally competent, (sic) but I think in order to just to preclude or prevent anybody else who doesn't know you from coming in here and say, well, Edward Smith is not competent to make this decision to forego his appeals based upon any conversations with him, I just want you to know that I want to prevent somebody from going ahead and doing that, and that's the reason why I'm ordering a mental competency.

Hearing at 6 (emphasis added).

16. The judge who made these remarks found Mr. Smith incompetent to represent himself on appeal in July of 1985. See para. 4-9, supra.

17. After other similar comments indicating the judge's bias and pre-determination of the issue, the trial court adopted the order proffered by the state and appointed two doctors.

18. These doctors were recommended by the district attorney and employed by the executive branch.[1] The judge did not question the recommendation, and signed the order upon presentation by the state.

---

[1] Both Dr. Ganc and Dr. Brown are employed by Forensic Psychiatric Services, whose offices are in the Harris County Jail. The letterhead of the stationary that these doctor's reports are filed on includes the flagstaff: "The Mental Health and Mental Retardation Authority for Harris County."

19. This ceremony was so obviously pre-arranged by the district attorney, so obviously a non-adversarial proceeding, that the assistant district attorney had pre-scheduled the competency exams to occur on the very next day. Hearing at 9.

20. Neither the trial court nor the district attorney's office ever contacted the attorney for Ms. Hamilton, who had been involved in the litigation of Mr. Smith's case from the time of denial of his direct appeal in 1988 to the present.

21. The trial court reconvened the ceremony on May 23, 1990. Hearing at 13. This event was, if possible, more cursory than the former. The trial court indicated that the state-employed and appointed witnesses filed reports indicating that Mr. Smith was "competent to make a decision regarding [his] execution." Id. at 13.

22. In stark contrast to the proper procedures followed by the trial court in the July 1, 1985, hearing, the trial court made no inquiry regarding Mr. Smith's ability to proceed pro se, no inquiry regarding his understanding of the rights at stake, and no inquiry regarding the claims he would waive by failing to proceed in post-conviction proceedings. The record is utterly silent in regard to this necessary inquiry.

23. The trial court made no finding regarding Mr. Smith's competency, except to sign and issue an execution order. That order set Mr. Smith's execution for 12:01 on June 26, 1990.

24. Since before trial, the state has been on notice that Mr. Smith was charged with a prior offense and was found not



guilty by reason of insanity. R. Vol. I at 60-62. In pretrial proceedings, the state was ordered to turn over to defense counsel any psychiatric reports or other evidence of incompetence regarding his earlier trial. R. Vol. I at 63-64.

25. Further, the Petition for Writ of Certiorari had given the state renewed notice of Mr. Smith's prior injury and mental instability. See, para. 11-12, supra. Yet neither the state, nor the trial court, nor the state-employed experts pursued, presented, or considered the evidence that Mr. Smith is incompetent to make the decision he has been called upon to make.

26. Counsel has since been able to secure records, including the reports of psychiatrists and psychologists, from the Miami, Florida, case in which Mr. Smith was found not guilty by reason of insanity. Those mental health experts concur that Mr. Smith is severely disturbed, is chronically schizophrenic, and was unable to adequately assist in his defense. Exhibits 4-6.

27. This evidence, known to the state and available to its experts, made the need for a more complete competency hearing obvious. The first report is from Dr. Mutter, M.D., P.A. Dr. Mutter is a practicing psychiatrist in Miami, Florida, and is also a member of the American Psychiatric Association. Dr. Mutter spent approximately one and one half hours with Mr. Smith. Mr. Smith, during this examination, indicated that he had a memory lapse from September, 1977, through February, 1978. Id. Mr. Smith claimed to have used marijuana and the psychedelic drug

mescaline. Id. at 2. He indicated that he was seen in the military service after an attempt to hang himself. Id. Mr. Smith claimed to have had an experience at the age of seven when he believed that a "foreign spirit tried to enter his body." Id. Dr. Mutter concluded that Mr. Smith is a "schizoid individual."

28. Dr. Mutter also placed Mr. Smith in a hypnotic regression trance. The results of this trance are attached to Dr. Mutter's report. Exhibit 4. In the regression, Dr. Mutter reports that Mr. Smith believes that "a foreign spirit was possessing his body." Mutter at 3. The abstract of the hypnotic regression evidences a severe psychotic break. A small part of the abstract indicates that Mr. Smith reported the following:

> At this point the patient became agitated and described a different picture. There were demons (increase pulse and psychomotor activity). Melvin told me. He lives in Washington, D.C. They eat meat. They don't worship Krishna. They want me to build a house for my ancestors. They give me the land for it. ... They are going to make me a clari (servant to the king). They give me a -- they cut my face with a razor blade. (Cut any other part of the body?) No. (Finger up) They want to feed my head -- pigeon. I do not want to eat it. Something is wrong. There is blood on my head. (Patient becomes visibly anxious). They are going to make me a slave. (Silence -- then dissociation from body with T.V.) They cut him in the head and right arm. They shave his head. They are chanting. ... I am becoming a demon, slaughtering animals for sacrifice. A chicken, rooster and goat.

Hypnotic Regression at 1. This psychotic rambling continues at length. The abstract of Dr. Mutter fills three pages.

29. Dr. Mutter concluded that:



> This individual suffered from an acute psychotic break .... The psychotic reaction was sufficient in degree to prevent him from knowing right from wrong and understanding the nature and consequences of his acts....

Mutter at 3.

30. The second report also easily available but ignored by the state and its experts was written by Dr. William Corwin, M.D., P.A. Dr. Corwin is also a psychiatrist whose office and practice is in Miami, Florida. Report of Dr. Corwin (Corwin); Exhibit 5. Dr. Corwin discovered much the same background information as Dr. Mutter. Dr. Corwin also discovered that Mr. Smith complained of "'greyouts' where he almost passes out and feels foggy." Corwin at 3. Dr. Corwin reported that:

> [Mr. Smith] appeared somewhat flat and withdrawn and rarely smiled. He was evasive when questioned about hallucinations. He stated that in the past and since childhood he has had clairvoyant experiences, in addition to pre-cognitive, and telepathic experiences. Apparently he has also had some visual hallucinations. He speaks of seeing "subtle bodies" which he finds hard to describe.

Corwin at 3. Dr. Corwin also makes these important observations:

> Insight is impaired. He does not believe that he is ill nor does he feel that he needs psychiatric treatment or hospitalization.

Corwin at 4.

31. Dr. Corwin concludes with an even stronger assessment and diagnosis than Dr. Mutter:

> I believe that [Mr. Smith] is suffering from schizophrenic, paranoid in type. Evidence of emotional problems go back a number of years, and it may very well be that he suffered an attack of acute psychosis in connection with

> his experience in voodoo camp in South Carolina. He continues to show indications of psychotic symptoms ... such as flattening of his emotions, evasiveness, hallucinations, and paranoid attitudes.

Corwin at 4.

32. Dr. Norman Reichenberg, Ph.D., P.A., was the third doctor to interview Mr. Smith. Report of Dr. Reichenberg (Reichenberg); Exhibit 6. Unlike any doctor in Texas, Dr. Reichenberg's interview is the only one to date which includes neuro-psychological testing. Dr. Reichenberg administered the Bender Designs Test, HTP Drawings Test, a Sentence Completion Test, and a Rorschach Ink Image Test. Reichenberg at 1. Dr. Reichenberg's immediate conclusion was that:

> The test patterns were all consistent in emphasizing chronic schizophrenic processes operating in this individual and the covert patterns suggest that dissociative behavior would be within strong psychological probabilities.

Reichenberg at 1.

33. Dr. Reichenberg then discusses more fully the specific results gained from testing:

> Bender Designs, HTP Drawings and the Sentence Completion items all emphasize the serious ideational turmoil and disturbance masked by religious preoccupation in this individual and suggest that schizophrenic processes are of long-standing.

Reichenberg at 2. This statement fully describes Mr. Smith's continuing schizophrenic behavior, religious ideation and confused thought processes.



34. Dr. Reichenberg concluded with several significant opinions based on his testing and interview with Mr. Smith.

> In the opinion of the examiner, [Mr. Smith] functions in terms of chronic schizophrenic processes that are masked by his intellectualization and his emphasis on religious preoccupation.
>
> In the opinion of the examiner, he is only superficially capable of aiding in his own defense at the present time and the patterns suggest that the dissociative episodes described by the defendant were sincere and psychologically probable.

Reichenberg at 2.

35. These conclusions led the Florida Court to find Mr. Smith not guilty by reason of insanity in his criminal case. Exhibit 7.

36. As stated above, the earlier Supreme Court pleadings provided the state with actual notice of the existence of psychological reports and testimony. Further, it is apparent that the state-employed witnesses who evaluated Mr. Smith were denied access to these reports by the district attorney's office. In their urgency to preclude and prevent contrary views, none of these records were sought, presented or considered by either the state or the trial court.

37. These reports are critical to any determination of Mr. Smith's present competency. Any conclusion based on evaluations without the use of these reports is patently incomplete and inaccurate.

38. One mental health expert has reviewed all the available information is Dr. Joyce Carbonell. See, Affidavit of Joyce

Carbonell, Ph.D. (incorporating affidavit of Eden E. Harrington, Esq.) (hereinafter Carbonell), Exhibit 8.

39. Dr. Joyce Carbonell is a clinical psychologist licensed to practice in the States of Florida and Georgia. She received a B.S. degree in 1973 from the University of Rochester, and M.S. and Ph.D. degrees in clinical psychology from Bowling Green. She interned at Baylor College of Medicine in Houston, Texas in 1977-78. She also conducted post-doctoral research through the N.I.M.H. in the Application of Psychology to Crime, Delinquency, and the Criminal Justice System. Vita, Dr, Joyce Carbonell, Exhibit 9.

40. Dr. Carbonell is currently an Associate Professor of Psychology at Florida State University. She is the Director of the F.S.U. Psychology Clinic, and Director of the Crisis Management Unit. She has been certified by the Florida Department of Law Enforcement as a Criminal Justice Standards Instructor. Further, she has published widely in a number of areas pertaining to psychological assessment in prison settings, mental health, mental health diagnosis and testing.

41. Since 1978 Dr. Carbonell has performed at least one hundred forensic mental status exams. She has been qualified as an expert on mental health issues in state and federal courts in Florida, Mississippi, Illinois and Georgia numerous times. She has appeared as a witness for courts, the defense and the prosecution.

42. The information that Dr. Carbonell reviewed includes:



1) Transcripts of May 17, 1990 and May 23, 1990 hearings before the 178th District Court of Harris County;

2) May 18, 1990 Report of Dr. Jerome B. Brown;

3) May 21, 1990 Report of Dr. Jaime Ganc;

4) May 5, 1988 Affidavit of Dale Piper;

5) Undated Psychological Evaluation by Howard P. Blevins, Phd. and C. Yates Morgan, Phd., Texas Department of Corrections;

6) April 28, 1988 Letter by Drs. Blevins and Yates;

7) May 5, 1988 Affidavit of Randy McDonald;

8) May 4, 1988 Affidavit of Alexzene Hamilton;

9) May, 1988 Associated Press newspaper article titled "Inmates Discusses Voodoo Killings Day After Reprieve";

10) February 7, 1984 Report of Dr. Jerome B. Brown;

11) February 7, 1984 Report of Dr. John D. Nottingham;

12) Transcript of Mr. Smith's testimony at trial in the Harris County capital murder case;

13) June 7, 1983 Report of Dr. John D. Nottingham;

14) June 14, 1983 Report of Dr. Jerome B. Brown;

15) June 14, 1983 Sanity Evaluation of Dr. Jerome B. Brown;

16) July 28, 1978 Order of the 11th Judicial Circuit, Dade County, Florida;

17) May 31, 1978 Report of Dr. Charles Mutter;

18) May 21, 1978 Report of Dr. William Corwin;

21) May 18, 1978 Report of Norman Reichenberg, Phd.;

23) May 13, 1978 Report of Dr. Charles Mutter; Carbonell at 3-4.

43. Dr. Carbonell further considered the tests performed by Dr. Reichenberg in Miami, Florida. See para. 33, supra.

44. Dr. Carbonell was also able to consider reports and interview notes from several state sources. See Carbonell at 4. These current, state generated documents reinforce the earlier findings of the doctors in Miami.

45. Among the information considered by Dr. Carbonell was the Texas Department of Corrections Reports of Dr.s Blevins and Morgan. Texas Department of Corrections Psychological Evaluation, conducted by Dr. Blevins and Morgan (TDC Evaluation), Exhibit 10. This recent state-generated report indicates that Mr. Smith was hostile and refused to be interviewed. TDC Evaluation at 2. These Doctors noted that Mr. Smith's reason for refusing treatment was his fear that the interviewers "would 'scientifically analyze' him and (gesturing with his hands) 'put me in a box... box me in a corner.'" Id. at 2.

46. Dr. Carbonell also considered Mr. Smith's lengthy history of suicide attempts and suicidal ideation, which was remarked upon in the TDC Evaluation. Id. at 3.

47. This history led Dr.s Blevins and Morgan to conclude that:

> Given his history of suicidal ideation, threats, and attempts over the last seven years, one cannot entirely rule out the possibility that his current decision to forego appeal of his execution is related to his desire to die.



Id. at 4 (emphasis added).

48. These doctors also recommended further neurological testing, which has never been carried out.

> An additional consideration is the fact that the noise of death row may be accentuated by his development of Bell's Palsy Syndrome which tends to increase sensitivity to noise in the ear of the effected side. Of course, only a neurological examination completed by a qualified specialist could confirm this hypothesis.

Id. at 4 (emphasis added).

49. The final sentence of their report indicates "... further examination and evaluation of Mr. Smith, with Mr. Smith's cooperation, may be required to establish the connection between his current decision [to forego appeals] and his suicidal propensities." Id. at 4. No further examination and/or evaluation has ever been conducted.

50. Dr. Carbonell also considered Mr. Smith's bizarre religious and mystical beliefs. Carbonell at 6-7. This included a report of Dr. Brown which indicates that Mr. Smith referred to himself and others as "demons." See also, Mutter; Corwin; Hamilton.

51. Regardless of this information, neither the state witnesses nor the trial court ever made any inquiry into Mr. Smith's religious ideation and strange beliefs, his suicidal tendencies, or the affect that these issues had on his decision to forego further appeals.

52. After reviewing all information available to Ms. Hamilton at this time, Dr. Carbonell was able to reach the following conclusions and determinations:

> I have formed a professional opinion with a reasonable degree of medical certainty concerning James Edwards Smith's current mental state. My opinion is that Mr. Smith has a history of schizophrenia that appears to be paranoid in nature, marked by suicidal tendencies and religious delusions. There is also the possibility of organic brain damage, indicated by Mr. Smith's history of head injuries, drug and alcohol abuse, and symptoms of neurological damage. At this time, based on Mr. Smith's condition, it is my opinion that he is mentally ill; that this illness prevents Mr. Smith from understanding his actual legal position and the options available to him; and that this illness prevents Mr. Smith from making a rational choice among his options.

Carbonell at 3.

53. Even though Dr. Carbonell was able to consider these various sources when reaching her conclusion, she also states that for a complete determination of the breadth and effect of Mr. Smith's mental illness, she would professionally be required to perform, analyze and consider a much more complete evaluation.

> To fully complete my assessment of Mr. Smith's mental state I would need direct access to him for extensive testing. I would perform or have performed the following tests:
>
> a. I.Q.
> b. Rorschach Ink Image Test
> c. MMPI 2
> d. WAIS-R
> e. Halstead - Reitan Neuropsychological Battery
> f. WMS-R
> g. Audiology testing for hearing impairments
> h. Mental status exam of Mr. Smith



54. There is no indication that the trial court, the state, or the state experts, at the recent competency proceeding, considered nearly as much information as Dr. Carbonell. Further, the record indicates that Mr. Smith has <u>never</u> been tested by any mental health professional in Texas. Finally, the record also shows that the neither the trial court, nor the state sought to present or develop any type of full investigation of Mr. Smith's documented mental illness.

55. Similarly, there is no evidence that the state or the trial court considered the affidavit of Mr. Smith's mother, Alexzene Hamilton filed with the Petition for Writ of Certiorari. (Affidavit of Alexzene Hamilton (Hamilton); Exhibit 11. This affidavit includes much necessary information relevant to any determination of competency. Ms. Hamilton states:

> Eddie [Mr. Smith] has a history of mental problems and has also had physical accidents which may have had an effect on his mind. I know that when Eddie was in the Navy he was put into the hospital because of mental problems and I think these problems may have caused his discharge from the Navy. I am also aware that Eddie was in a car wreck in New Orleans, Louisiana in which he injured his head and that he fell and severely hurt his head in Houston in 1983.

Hamilton at 1.

56. Ms. Hamilton also describes more recent, post-trial evidence of mental problems. Hamilton at 2. Even though this information was available, even though Ms. Hamilton had litigated this case for two years in the Supreme Court claiming that Mr. Smith was incompetent to act in his own best interest, even

though the trial court was allegedly attempting to determine Mr. Smith's competency to forego further appeals, Ms. Hamilton's counsel was never contacted regarding this trial court proceeding. This precluded Mr. Smith's own mother from presenting relevant testimony to the trial court.

57. The state also did not call Mr. Smith's prior appointed counsel, Mr. Randy McDonald. Exhibit 12. Mr. McDonald stated that Mr. Smith "suffered mood swings, inappropriate and abnormal affect and deep depression." Affidavit of Randy McDonald (McDonald) at 2. He also indicated that during trial Mr. Smith displayed other behavior that "confirmed [Mr. McDonald's] views that he suffered from psychiatric problems." Id. There is no evidence that the state witnesses either spoke to Mr. McDonald or that he was subpoenaed to appear as a witness at the competency proceeding.

58. Ms. Hamilton has also been denied access to her son's records in prison, his records from various prior hospitalizations and mental examinations, and has been denied access to Mr. Smith, as well. This is because of her son's mental illness and his delusional desire to die.

59. Mr. Smith has refused to meet with his mother. He has further refused to meet with any representative of his mother, including counsel. He has also refused any meetings with any mental health professionals that are independent of the executive branch. These actions, supported by the state, further increase the denial of an adversarial investigation of his mental illness.



60. For these reasons, Ms. Hamilton pursued her legal claims in state post-conviction proceedings. On June 20, 1990, after finally learning about the competency proceeding held by the trial court and Mr. Smith's imminent execution, Ms. Hamilton, through undersigned counsel, prepared and filed a Petition for Writ of Habeas Corpus on Mr. Smith's behalf. This petition contained many meritorious claims that require reversal of Mr. Smith's conviction and sentence.

61. The next day, June 21, 1990, in keeping with the prior actions of the trial court, the judge signed a state prepared document entitled "Findings of Fact and Conclusions of Law" (Hereinafter Findings). This document disregarded all the above evidence of Mr. Smith's continuing mental illness to reach its obviously incorrect conclusions.

62. Incredibly, the trial court claimed that Mr. Smith's reports from 1978 are "too remote to be beneficial to the court's inquiry." This finding is without any further consultation with the evaluating mental health experts. This finding is based on no evidence in the record and is clearly erroneous. This finding is simply incorrect. The trial court in its attempt to "preclude and prevent" an accurate determination of this issue, ignored the facts to suit its earlier flawed findings. See para. 15, supra. The trial court also disregarded all the other affidavits filed in the case. Findings at 7 - 9.

63. The trial court also disregarded the information contained in the affidavit of Dr. Joyce Carbonell, even though

her opinion was based on significantly more information than that supplied to the state's expert, or relied upon by the trial court. Findings at 8.

64. The trial court, by disregarding the overwhelming evidence of long standing mental disease then reiterated its earlier, obviously flawed finding that Mr. Smith has no mental illness. The trial court has not even recognized that it previously found Mr. Smith incompetent to forego further appeals. See para. 6, supra. The trial court denied Ms. Hamilton standing to proceed on her substantive claims.

65. These findings were transmitted to the Texas Court of Criminal Appeals. That court adopted the trial court's findings and dismissed the petition June 22, 1990.



## REASONS FOR GRANTING THE WRIT

### I.

### ALEXZENE HAMILTON HAS STANDING TO PURSUE THESE CLAIMS AS NATURAL MOTHER AND NEXT FRIEND TO JAMES EDWARD SMITH

In Whitmore v. Arkansas, ___ U.S. ___, 47 Crim.L.Rep. 2050 (1990), this Court delineated the showing required for a third person party to proceed on another individual's behalf. in that case, the Court concluded that Jonas Whitmore, another Arkansas death row inmate, had no standing to proceed on behalf of Ronald Gene Simmons. Since Mr. Whitmore lacked standing, the Court dismissed the petition for lack of jurisdiction. Before reaching that result, however, the Court examined two possible avenues for standing: direct standing under Article III or next friend standing. Ms. Hamilton is properly before this Court on either theory of standing.

#### A. Article III Direct Standing

Ms. Hamilton, as mother of James Smith, has direct standing in this litigation. Her interests, as natural mother to James Smith, are legally unassailable. To establish direct, third-party standing, the Supreme Court in Whitmore outlined the following requirements:

> To establish an Art. II case or controversy, a litigant first must clearly demonstrate that he has suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and

> temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," ... as opposed to merely "[a]bstract," ... and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." Further, a litigant must satisfy the "causation" and "redressability" prongs of the Art. III minima by showing that the injury "fairly can be traced to the alleged action," and is "likely to be redressed by a favorable decision."

Whitmore, 47 Crim.L.Rep. at 2051 (citations omitted).

Ms. Hamilton easily meets all of these requirements. First and foremost, Ms. Hamilton is the natural mother of Mr. Smith. There are three very distinct injuries that she imminently faces. The first is the execution of her son, the death of a loved child. The second injury that she will suffer, as natural mother, is the execution of her son after an incomplete and state controlled proceeding regarding her son's capacity to forego further appeals. Third, Ms. Hamilton also will be injured if her child is executed while he is not competent to make a rational decision regarding the voluntary dismissal of his appeals, and if he is executed while he has no rational understanding of the purpose for and meaning of his execution.

The relationship between natural family members has long been constitutionally protected under the Fourteenth Amendment. See, e.g., Woodrum v. Woodward County, Okl., 866 F.2d 1121 (9th Cir. 1989) (Parents have constitutionally protected liberty interest in their children). This liberty interest has not been adequately addressed by the procedure that the state court



offered which did not even include notice to Ms. Hamilton. See Section II, infra.

The alleged harm is actual and imminent. Her son, Mr. Smith, is scheduled to be executed next week, at 12:01 on June 26, 1990. This is not a "hypothetical" or "conjectural" injury. If Mr. Smith is executed without his mother's claims being properly afforded a forum for litigation, then there will be no further opportunity to present her interests.

Finally, the redress of her injury can be "'fairly traced to the present action,' and 'is likely to be redressed by a favorable decision.'" Whitmore, at 2051 (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)). Therefore, this Court, pursuant to Whitmore, must allow Ms. Hamilton to proceed as a direct, third-party in interest to this action. Whitmore, at 2051.

### B. Next Friend Standing

This Court must also allow Ms. Hamilton to proceed on her son's behalf as a "next friend." The Whitmore case is the most recent rule regarding the requirements necessary to proceed as a next friend to a death sentenced inmate. Whitmore, at 2053-2054. For an individual to proceed as a next friend, the Supreme Court has recognized

> [T]wo firmly rooted pre-requisites for "next friend" standing. First, a "next friend"

> must provide an adequate explanation -- such as inaccessibility, mental incompetence, or other disability -- why the real party in interest cannot appear on his own behalf to prosecute the action. ... Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate....

Whitmore, at 2053.[2]

Ms. Hamilton has pleaded and presented evidence in support of both prongs of this test. Mr. Smith cannot proceed on his own behalf because he is incompetent. Because she has presented evidence raising a colorable claim of incompetency, the second prong naturally flows: Mr. Smith's mental disease prevents him from acting in his best interests, which include presenting his meritorious constitutional claims in post-conviction litigation.

As described above, Mr. Smith is mentally ill. He is a chronic paranoid schizophrenic of long duration. See Rees v. Peyton, 384 U.S. 312, 314 (1966); Rumbaugh v. Procunier, 753 F.2d 395, 398 (5th Cir. 1985). Further, Mr. Smith's mental disease "prevent[s] him from understanding his legal position and the options available to him." Rumbaugh at 398. For that reason, he cannot "mak[e] a rational choice among his options." Id.

The evidence before this Court supporting these conclusions is extensive. The reports from two Florida psychiatrists and one psychologist find that Mr. Smith suffers long term and continuing

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[2] The Supreme Court also recognized that "a 'next friend' must have some significant relationship with the real party in interest." Id. (citing Davis v. Austin, 492 F.Supp. 273, 275-76 (N.D. Ga. 1980). Ms. Hamilton, as natural mother, has both a significant and constitutionally protected relationship with Mr. Smith.



mental illness. These conclusions led the Florida Court to find Mr. Smith not guilty by reason of insanity in his criminal case. All these mental health experts concur that Mr. Smith is severely disturbed, is chronically schizophrenic, and was unable to adequately assist in his defense.

Moreover, there can be no credible claim that this evidence is too remote. In 1985, the trial court found that Mr. Smith was incompetent to forego further appeals or to proceed pro se. See, para. 6, supra. In 1990, Dr. Carbonell has reached the same conclusion. See para. 52, supra.

She concluded that Mr. Smith is "mentally ill; that this illness prevents Mr. Smith from understanding his actual legal position and the options available to him; and that this illness prevents Mr. Smith from making a rational choice among his options." Carbonell at 3.

The trial court's one-sided, non-adversarial proceeding to allow Mr. Smith to volunteer for death, was inadequate to determine any of the legal issues at stake. See Reasons for Granting the Writ II - III. This Court cannot depend on the action of the trial court when the proceeding was so obviously biased, was presided over by a judge who had pre-determined the ultimate issue, and was conducted without notice to Ms. Hamilton.

The state relies on this Court's opinion in Demostenes v. Baal, ___ U.S. ___, No. A-857 (June 3, 1990) slip op. In Baal, this Court vacated a stay of execution earlier issued by the Ninth Circuit Court of Appeals. The Court reasoned that Mr. and

Mrs. Baal, who were proceeding as next friend to their son who was voluntarily foregoing his appeals, had no standing to proceed because they had not made a sufficient showing of their son's incompetence to require a full evidentiary hearing.

Mr. Smith's case is substantially different from Baal in several significant ways. The only evidence indicating Mr. Baal might be incompetent was an affidavit of a psychiatrist who had not examined Mr. Baal. Even this affidavit only stated that Mr. Baal "may not be competent to waive his legal remedies." Baal, ___ U.S. ___ slip op. at 5.

Mr. Smith, by contrast, has previously been found insane by mental health experts, and incompetent by the trial judge. Mr. Smith has been evaluated by psychiatrists and a psychologist and found to be suffering from a long standing mental illness. Mr. Smith has been examined and found to be schizophrenic and paranoid. Mr. Smith has been examined and found to be suffering from hallucinations and psychotic breaks. Mr. Smith has been found to have a long history of suicide attempts and suicidal ideation.

Further, Dr. Joyce Carbonell does not equivocate in her opinion after review of all the records available. "At this time, based on Mr. Smith's condition, it is my opinion that he is mentally ill; that this illness prevents Mr. Smith from understanding his actual legal position and the options available to him; and that this illness prevents Mr. Smith from making a



rational choice among his options." Carbonell at ___; Cf. Baal, slip op. at 5.

This is tangible evidence of mental illness. This is not speculative. This is "meaningful evidence that [Mr. Smith is] suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision." Whitmore, 47 Crim.L.Rep. at 2054 (citation omitted). The preclusion of this evidence by the state render the findings of the trial court clearly erroneous, and they are not "fairly supported by the record." See 28 U.S.C. § 2254(d).

Mr. Smith "is suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision." Whitmore at 2054 (citing Rees v. Peyton, 384 U.S. 312, 314 (1966)). As such, Ms. Hamilton, as natural mother, therefore has standing to proceed both as a direct third-party in interest, and as a "next friend" to her son, James Smith. Therefore, this Court must allow Ms. Hamilton to proceed in this case to a full determination of all issues, and remand this case to the federal district court for a full and fair adversarial determination of Mr. Smith's competency to forego his appeals and his competency to be executed.

II.

**THE HEARING HELD IN THE TRIAL COURT VIOLATED ESTABLISHED PRINCIPLES OF DUE PROCESS AND DENIED PETITIONER THE RIGHT TO NOTICE AND FULL REVIEW GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS**

The previously described hearing held in the 178th District Court of Harris County violated even the most basic due process of law considerations, in violation of the Fourteenth Amendment to the United States Constitution. The non-adversarial proceeding was little more than an ex parte chat between the trial court, the prosecutor, and the mentally ill defendant. No serious attention was paid to any issue. First, no notice was given to other parties in interest. Second, no proper inquiry into Mr. Smith's actual ability to forego his appeals and proceed pro se was conducted. Third, no evidence besides bare reports of the state recommended and paid witnesses was taken or sought. Fourth, there was no test of the reliability of these findings through cross-examination. These proceedings violate Ford v. Wainwright, 477 U.S. 399 (1986) and Rees v. Peyton, 384 U.S. 312 (1966). See also, Whitmore v. Arkansas, 47 Crim.L.Rep. 2050 (1990), Demosthenes v. Baal, ___ U.S. ___, No. A-857 (June 3, 1990).

The Supreme Court has not directly ruled on "the question whether a hearing on mental competency is required by the United States Constitution whenever a capital defendant desires to terminate further proceedings." Whitmore, at 2054. It has,



however, indicated that "such a hearing will obviously bear on whether the defendant is able to proceed on his own behalf." Id.; see also Rees v. Peyton, 384 U.S. 312 (1966). What the trial court in this case captioned as a "Hearing to Determine Defendant Foregoing Further Appeals" was procedurally inadequate to faithfully determine any of the issues that the trial court had the duty to investigate. Most of the legally and procedurally inadequate features of this 'hearing' can be readily traced to the outrageous failure to notify Ms. Hamilton, which led to the unconstitutional preclusion of contrary evidence. See Ford v. Wainwright, 477 U.S. 399, 348-349 (1986).

The result of the competency proceeding was preordained. The trial court was openly uninterested in the serious legal questions that Mr. Smith's actions raise. Hearing at 6. After prejudging the merits of the case, the trial court stated its real concern in holding the hearing was "in order to just to preclude or prevent anybody else" from raising any constitutional claims on behalf of Mr. Smith. Id. To that end, neither the trial court nor the district attorney who organized the hearing, served, notified, or in any way contacted Ms. Hamilton. This failure occurred in spite of the fact that the State of Texas, both through the Harris County District Attorney's Office and the Attorney General's Office litigated against Ms. Hamilton's claims of incompetency throughout two years of proceedings in the Supreme Court. See Hamilton v. Texas, No. 87-6927, cert. denied ___ U.S. ___, 110 S.Ct. 1958 (1990).

There can be no excuse for the failure to notify counsel for Ms. Hamilton other than the desire, stated openly by the trial court, to preclude opposing views. As stated in Ford:

> [A]ny procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate.

Ford v. Wainwright, 477 U.S. at 414. This procedure, which was an open attempt to preclude relevant evidence, testimony, and claims is as odious as that decried in Ford. There is no support for the decision to exclude counsel of record in the Supreme Court proceedings from the hearing. The lack of notice was among the several methods the trial court employed to "preclude or prevent" people from raising meritorious issues on Mr. Smith's behalf, or even protecting the constitutionality of the proceedings.

The procedure held in the trial court, without notice to counsel for Ms. Hamilton, violated the fundamental principle of due process -- the right to be heard -- and therefore violated the Fourteenth Amendment to the United States Constitution. This Court should grant certiorari and return this case to the district court for a full and fair adversarial determination of Mr. Smith's competency to forego further appeals and be executed.



### A. The Hearing Violated Due Process Of Law Because The Trial Court Failed To Determine If Mr. Smith Made a Rational Choice With Respect To Abandoning His Appeals

The issue of Mr. Smith, as a death sentenced inmate, abandoning his further appeals is of constitutional moment. See, e.g., Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985). Many issues are dependent on such determinations, including the issue of who may proceed on behalf of Mr. Smith.

> If [Mr. Smith] lacks the mental competence to waive his rights to further judicial review of his conviction and sentence, his parents have standing to bring an action for habeas relief as next friends.

Rumbaugh, at 398. The Fifth Circuit Court of Appeals in Rumbaugh held that the correct standard to apply when deciding the issue of whether a person is mentally competent to choose to forego further appeals and collateral attacks on his conviction is the test enunciated in Rees v. Peyton, 384 U.S. 312 (1966). The test is:

> whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Rees, at 314. See also, Rumbaugh, at 398. To implement this standard, the Fifth Circuit devised a three part test that a court must apply once an individual wishes to forego further appeals. That process is:

> 1) Is the person suffering from a mental disease or defect?
>
> 2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?
>
> 3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?

Rumbaugh, at 398.

From the information available to this Court, it is obvious that Mr. Smith suffers from a mental illness -- namely chronic, paranoid-type schizophrenia. See Exhibit 4-6, 10-12. The trial court made no such inquiry, and in fact, as noted above, precluded the consideration of vitally important information on the nature and history of his mental illness. Therefore, the trial court's ultimate findings are constitutionally flawed from the outset.

Mr. Smith is mentally ill. Therefore, the courts are required to further inquire regarding the following two questions. Rumbaugh, at 398-399. The trial court's hearing on this issue never even attempted an honest inquiry into Mr. Smith's problems. It certainly did not move to any analysis of Mr. Smith's understanding of his legal position and the options available to him.

This cursory proceeding does not begin to comport with examples of constitutionally adequate determinations of



competency to forego appeals. Procedurally, the facts of Rumbaugh are very similar to Mr. Smith's case. Like Mr. Smith, Mr. Rumbaugh attempted to discharge his court appointed counsel through a pro se motion filed with the Texas Court of Criminal Appeals. Id. at 396. Like Mr. Smith, Mr. Rumbaugh requested that the trial judge set his execution date as soon as possible. Id.; see also, Hearing at 14.[3] Like Mr. Smith, Mr. Rumbaugh refused to allow anyone to file any further pleadings in his case. Id. at 397. Finally, also like Mr. Smith, Mr. Rumbaugh's parents (both mother and father) filed a next friend petition for habeas corpus relief.

Unlike the proceedings in Mr. Smith's case, Mr. Rumbaugh eventually had a full and complete hearing regarding his competency to forego further appeals.[4] This hearing was only commenced after Mr. Rumbaugh was transferred to a medical facility where he was examined by a team of psychiatrists and psychologists. The hearing allowed the cross examination of

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[3] At the 'hearing' held by the trial court, the following exchange occurred:

> THE COURT: All right. The next thing for the court to do then is to set an execution date. Is that what you want me to do?
>
> THE DEFENDANT [MR. SMITH]: That's my desire. Has been, continues to be. Yes, I like to have an execution date set as soon as possible. Preferably next Saturday, that's fine. I don't have any scheduled event.

[4] In Rumbaugh, the state courts denied any hearing and the federal district court in the Northern District of Texas, Amarillo Division, issued a stay and proceeded with a complete evaluation and adversarial hearing.

witnesses and allowed the next friend petitioners the opportunity to present witnesses on behalf of their claim to standing. Rumbaugh, at 397. Further, the evaluations involved detailed questions regarding Mr. Rumbaugh's understanding of his legal position. This included a list by Mr. Rumbaugh of "several arguably sound grounds for attack which could not be summarily rejected." Id. at 402.

The decision made by the trial court here displays none of these qualities. The experts appointed by the court were recommended by, and employees of, the executive branch. See n. 2, supra. The evaluations included none of the testing or interviewing ultimately relied upon in Rumbaugh. Further, there is no indication that either the evaluators or the trial court ever attempted to determine if Mr. Smith had any awareness whatsoever regarding what issues he would be foregoing.[5]

This type of inquiry, completely absent in Mr. Smith's case, occurs in other constitutionally validated hearings. See, e.g., Whitmore v. Arkansas, ___ U.S. ___, 47 Crim.L.Rep. 2050, 2051 (1990) (volunteer encouraged to appeal, discussed possible points of error, fully examined regarding capacity to understand choice between life and death and rights to appeal). It would be unconscionable to allow Mr. Smith to be executed on the basis of such an inadequate, pre-determined, and non-adversarial investigation of his competency to make such decisions.

[5] This is precisely the reason why this same trial court found Mr. Smith was incompetent to forego his direct appeal in July, 1985.



Therefore, this Court should grant this petition for writ of certiorari and remand to the district court so that the issue of his competency to forego further appeals may be completely litigated in compliance with Rees v. Peyton, 384 U.S. 312 (1966); Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985); and the Eighth and Fourteenth Amendments to the United States Constitution.

### B. The Hearing Violated Due Process Of Law Because The Trial Court Failed To Follow Due Proces And Failed To Determine If Mr. Smith Is Competent To Be Executed

The trial court also failed to conduct a hearing in compliance with Ford v. Wainwright, 477 U.S. 399 (1986), or this Court's application of the Ford principles to Texas law as stated in Ex Parte Jordan, 758 S.W.2d 254 (Tex. Crim. App. 1988). Therefore, this Court should grant certiorari to determine what is the constitutionally appropriate procedure to determine whether Mr. Smith is incompetent to be executed. In Ford, this Court held that it was unconstitutional to execute an incompetent prisoner. Ford, at 409-410. After re-affirming this age-old principle, the Court invalidated the procedure employed by Florida for determining whether or not an inmate was competent to be executed. Id. at 418. This decision was premised on the conclusion that many aspects of the Florida procedure violated due process and diminished the chances that the decision was accurate.

The first deficiency of the procedure employed in Ford was that the fact-finder, there the Governor, precluded relevant information and prevented an adversarial fact-finding hearing. The Supreme Court held that any procedure which precludes the presentation of "material relevant to [the inmate's] sanity or bars consideration of that material by the factfinder is necessarily inadequate." The Court further stated:

> [W]ithout any adversarial assistance from the prisoner's representative -- especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission -- the factfinder loses substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.

Ford, at 414.

The procedures employed in Mr. Smith's situation are as condemnable as those employed in Mr. Ford's. The district attorney and the trial court, although fully aware of Ms. Hamilton's intervention on her son's behalf as his representative, excluded her from the hearing. The trial court did not even attempt to gain or consider the information available regarding his competence. Further, because the trial court, the district attorney, and the defendant himself were effectively acting in concert to prevent any complete inquiry into his competence, there was a complete lack of adversarial input. This alone rendered the proceeding unconstitutional in light of Ford.



A related flaw in the Florida system was "the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions." Id. at 415. The same is true of Mr. Smith's 'hearing.' Because counsel for Ms. Hamilton was not contacted, no cross-examination occurred at all. In fact, the hearing was devoid of any testimony save the unsworn comments of Mr. Smith. No psychiatrist appeared and no psychologist appeared before the court. The two state employed and recommended doctors merely filed reports, leaving no opportunity for anyone, even the judge, to inquire into their methods or conclusions.

> The failure of the [Texas] procedure to afford the prisoner's representative any opportunity to clarify or challenge the state expert's opinions or methods creates a significant possibility that the ultimate decision made in reliance on those experts will be distorted.

Id.

The final unconstitutional flaw of the procedure in Ford was the complete discretion of the executive branch. Id. at 416. Although Mr. Smith's 'hearing' was before a judge, the controlling involvement of the executive branch, combined with the trial judge's stated pre-determination of the issue render the process employed in Harris County as unconstitutional as that in Ford. The executive branch apparently organized the 'hearing.' The executive branch recommended the experts that the trial judge, after making clear for the record his pre-determination of the issue, quickly appointed. The executive branch also employed the experts who came to the convenient

conclusion in which the executive branch has an interest. The judge's presence, by his own admission was "in order to just to preclude or prevent anybody else" from raising any issues on behalf of Mr. Smith, then, or in the future. The trial court in Mr. Smith's case apparently used the Ford decision as a reverse road map, followed only to insure that it drove through all procedures condemned by this Court.

The due process requirements articulated in Ford have also been applied to Texas courts by the Texas Court of Criminal Appeals in Ex Parte Jordan, 758 S.W.2d 254 (Tex. Crim. App. 1988); see also Ex Parte Hamilton, No. 18,380-02 (Tex. Crim. App. June 22, 1990) (Teague, J. dissenting: full adversarial hearing required under Jordan) (Exhibit 1). In Jordan, that Court found that Texas has no statute governing procedures to determine the competency of a death sentenced inmate before execution. Id. at 253. Therefore, the court openly urged the Texas legislature to enact a law to cover such situations. Id. The Texas Court did, however, approve the procedure of the trial court in Mr. Jordan's case. Among the many procedural safeguards afforded by the trial court in Mr. Jordan's case was the engagement of an independent expert. The court also applauded the adversarial proceeding, the opportunity to be heard, and the cross-examination of witnesses.

> Once competency became an issue, the court appointed an independent psychologist to examine applicant. Following the examination, the prudent trial judge afforded applicant a full adversarial hearing to determine his competency.... At the hearing,



> applicant was represented by counsel, given an opportunity to be heard, present evidence and cross-examine witnesses.

Ex Parte Jordan, at 254. Mr. Smith's hearing contained none of these procedures to guarantee an accurate determination. The Texas legislature has thus far failed to enact any statute to cover such situations. The absence of state legislated procedures cannot, however, save Mr. Smith's 'hearing' from the Constitution of the United States. As in Ford, the 'hearing' held by the trial court "provid[ed] inadequate assurances of accuracy." Id. This Court should grant this writ of certiorari to determine what procedure is due in a determination of competency to be executed and order "an evidentiary hearing ... de novo, on the question of his competence to be executed." Id.

### C. This Court Should Grant Certiorari In Light Of This Court's Grant Of Certiorari In Perry v. Louisiana, ___ U.S. ___, No 89-5120

Further, this Court should grant certiorari in this case in light of the recently granted certiorari review in the case of Perry v. Louisiana, ___ U.S. ___, No. 89-5120 (cert. granted March 5, 1990). In Perry, one of the questions now under review by this Court is whether the trial court's procedure in receiving and relying on ex parte communications from the state violates the safeguards required by the Eighth and Fourteenth Amendments. See, Brief on Behalf of Michael Owen Perry, No. 89-5120, at 40-43. The procedures followed by the trial court in Mr. Smith's case are directly analogous to those procedures questioned in

Perry. The trial court in Mr. Smith's case relied on a non-adversarial, state-organized presentation of state employed experts to reach its result.

This proceeding is even more egregious than the conduct in Perry. In Mr. Smith's case, unlike Perry, there was never any opportunity for opposing views to be presented. In fact, the trial court's stated goal was to preclude and prevent any opposing view from being heard. For this reason and for all other reasons related to the lack of sufficient process in the trial court's proceedings, this Court should grant this petition and give this cause plenary review.

III.

**THE STATE'S FAILURE TO DISCLOSE CRITICAL EVIDENCE CONCERNING MR. SMITH'S MENTAL INCOMPETENCY STRIPS THE TRIAL COURT'S DETERMINATION THAT MR. SMITH WAS COMPETENT TO FOREGO LEGAL RELIEF AND COMPETENT TO BE EXECUTED OF THE REQUISITE CONSTITUTIONAL RELIABILITY.**

Contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments, the state acted to conceal critical evidence concerning James Edward Smith's mental state. Since before trial, the state has been on notice that Mr. Smith was charged with a prior offense and was found not guilty by reason of insanity. R.Vol. I at 60-62. In pretrial proceedings, the state was ordered to turn over to defense counsel any psychiatric reports or other evidence of incompetence regarding his earlier trial. R. Vol. I at 63-64.



Further, the Petition for Writ of Certiorari had given the state renewed notice of Mr. Smith's prior injury and mental instability. In his petition for writ of certiorari, Mr. Smith's prior counsel emphasized his client's mental state and previous adjudications establishing his severe impairment:

> Mr. Smith has a long history of mental problems. He was hospitalized for psychiatric evaluation in the Great Lakes Naval Hospital in 1972. In 1978 he was found not guilty of robbery by reason of insanity by a Florida state court. Mr. Smith attempted suicide in 1981 and was placed in psychiatric care at the time.
>
> * * *
>
> Mr. Smith has also had physical injuries which may contribute to his lack of competency. Mr. Smith has been involved in two auto accidents which resulted in head injuries. Mr. Smith also injured his head in a fall in Houston not long before his arrest.

Application for Stay of Execution and Petition for Writ of Certiorari at 5.

Despite such clear notice, and constructive if not actual knowledge of the facts and prior proceedings establishing Mr. Smith's mental illness, the state acted in a manner designed to ensure that the Court remain ignorant of this critical material. Thus, on May 17, 1990, at the state's request this Court ordered Mr. Smith's appearance for purposes of conducting mental status examinations without notice to next friend counsel. Moreover, while urging the Court to appoint specific doctors to examine Mr. Smith, at no time did the state make any effort to ensure that

the doctors were aware of the prior adjudications and history of his mental illness.

A prosecutor's duty is to do justice, not seek the short-term victories of gamesmanship. Berger v. United States, 295 U.S. 78, 80 (1935). Minimally, that duty requires that a prosecutor preserve and disclose material that is relevant to sentencing, Brady v. Maryland, 373 U.S. 83 (1963), and refrain from presenting evidence in a manner that is misleading or distorted. Napue v. Illinois, 360 U.S. 264 (1959) (due process violated where prosecutor knowingly presents perjured testimony); Miller v. Pate, 386 U.S. 1 (1967) (due process violated where prosecutor "simulates" evidence). Where, as here, an individual's life is at stake the prosecutor's duty is all the more closely policed due to the heightened reliability interests of the eighth amendment. See, e.g., Gardner v. Florida, 430 U.S. 349 (1977); Beck v. Alabama, 447 U.S. 625 (1980).

What the prosecutor did to James Edward Smith, and the trial court's ability to make a full and fair determination of his competency to forego legal relief or competency to be executed, evidences utter contempt for a constitutionally sound adversarial system based on the principles of Napue, Brady and Gardner. Given the next friend's pleadings before the Supreme Court of the United States, the prosecutor was put on actual and constructive notice concerning Mr. Smith's mental state. See Giglio v. United States, 405 U.S. 150 (1972).



The state both knew and should have known that James Edward Smith suffers from a mental illness and has a long and marked history of schizophrenia. The state knew that the trial court had previously found Mr. Smith incompetent to waive his appeals or post-conviction remedies. See, July 1, 1985 Order of the 178th District Court of Harris County. The state also knew that the Texas Department of Corrections was of the opinion as recently as 1988 that "[g]iven his history of suicidal ideation, threats, and attempts over the last seven years, one cannot entirely rule out the possibility that his current decision to forego appeal of his execution is related to his desire to die." Ex. 5. Even more important, the state knew that Mr. Smith's mental state had been the subject of a prior adjudication and that a circuit court in Dade County Florida had found that he was not guilty by reason of insanity due to his mental illness -- namely chronic schizophrenia, paranoid type.

Yet the prosecutor did two things that all but guaranteed that the trial court would not receive the information it needed to make a constitutionally fair or reliable competency determination. One, the state deliberately failed to give notice to Mr. Smith's natural mother and next friend, Alexzene Hamilton, concerning the May, 1990, competency hearing. Two, despite making arrangements for a mental status examination to be performed, at no time did the prosecutor take steps to alert the doctors who performed the examination of Mr. Smith about the prior Florida litigation and examinations. Three, the state did

not even inform their recommended experts that this same trial court had determined that Mr. Smith was incompetent to forego appeals in 1985.

As a result of the state's misconduct, this Court, and the doctors who examined Mr. Smith, were deprived of critical and exculpatory material. Neither this Court nor the doctors learned that previous experts concluded that Mr. Smith was "schizoid," and suffering from "chronic schizophrenia." The Court and the doctors never learned that the individual who expressed a desire to waive all avenues of legal relief has also believed since he was seven years-old that a "foreign spirit tried to enter his body."

The above material was withheld from the trial court and the doctors who examined James Edward Smith in May of 1990. It was withheld as a result of the state's disregard for the values represented by Napue, Brady and Gardner. Consequently, the court was unable to render a fair or reliable decision concerning Mr. Smith's competency to forego appeals and post-conviction relief, or his competency to be executed. In the process, Mr. Smith's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and similar provisions of the Texas Constitution were violated. Therefore, this Court should grant this petition in order to answer this important question regarding the state's misconduct during post-conviction proceedings.



## CONCLUSION

This petition for certiorari should be granted, Ms. Hamilton should be allowed standing to proceed on behalf of her son, James Smith, and Mr. Smith's case should be remanded to the district court for full and fair proceedings on the issues presented herein. Alternatively, the petition should be granted so that this Court may give these important constitutional issues plenary consideration.

Respectfully submitted,

Ray N. Donley
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Scott, Douglass & Luton
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Jeffrey J. Pokorak
Eden E. Harrington
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Texas Resource Center
511 West 7th St.
Austin, Texas 78701
(512) 320-8300

BY: _____
Jeffrey J. Pokorak
Counsel of Record

EXHIBIT 1

EX PARTE ALEXZENE HAMILTON AS
NATURAL MOTHER AND NEXT FRIEND OF
JAMES EDWARD SMITH

Application for Stay
of Execution
From HARRIS County

NO. 18,380-02 - - -

**O R D E R**

This Court affirmed Smith's capital murder conviction and sentence of death on direct appeal. Smith v. State, 744 S.W.2d 86 (Tex.Crim.App. 1987). The trial court has scheduled Smith's execution to be carried out on or before sunrise, June 26, 1990.

Alexzene Hamilton, as natural mother and next friend of James Edward Smith, has filed an "Emergency Application for Stay of Execution and Objections to Trial Court's Prior Proceedings." The trial court has entered findings of fact and conclusions of law in connection with the application filed by Hamilton. The trial court has recommended the application be dismissed. We find the trial court's findings and conclusions are supported by the record.

Accordingly, the instant application is dismissed.

IT IS SO ORDERED THIS THE 22ND DAY OF JUNE, 1990.

PER CURIAM

En Banc
Do Not Publish
Teague, J., notwithstanding that such might, but probably only will cause a slight delay in carrying out applicant's obvious desire to carry into effect his long held death wish, as well as his strong belief that he will be reincarnated after he is killed, but believing that this Court, at least implicitly, has ruled that in a case such as this one, where the reasonable probability that the defendant is not competent to request that he be put to a premature death, or, to put it another way, to commit legal suicide through the hands of others, has been raised, it is necessary for the trial court to conduct a full adversarial hearing" on the issue. Given the possible favorable evidence now available, a "full adversarial hearing" should now be conducted in this cause. See Ex parte Jordan, 758 S.W.2d 250 (Tex.Cr.App. 1988). Also see Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 92 L.Ed.2d 335 (1986)

EXHIBIT 2

1,323

# THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 7, 1990

Mr. Rick Wetzel, Executive Administrator
Texas Court of Criminal Appeals
P. O. Box 12308, Capitol Station
Austin, Texas 78711

Re: James E. Smith, TDCJ# 763
Execution Date: July 24, 1990

Dear Mr. Wetzel:

We have just received notification that the above referenced prisoner has been sentenced to be executed on the above date at some time prior to sunrise.

The opinion of the Texas Court of Criminal Appeals affirming Mr. Smith's capital murder conviction is published at 744 S.W.2d 423 (Tex. Crim. App. 1987).

Our records show Mr. Smith proceeding pro se.

We will provide you with additional information as to this cause as the above date approaches.

Very truly yours,

ROBERT S. WALP
Assistant Attorney General
Enforcement Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

RSW/sw

** Rick - The case is assigned to me. Smith wishes to forego further appeals. Enclosed is his psychiatric evaluation and admonition by the trial judge. Smith's mother previously filed a "next friend" certiorari petition, denied by the Court on April 30, 1990. Alexis Hamilton v. State, No. 87-6927.

APPELLATE COURT NO. _____

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

AT AUSTIN

---

JAMES EDWARD SMITH,

Appellant

VS.

THE STATE OF TEXAS,

Appellee

---

APPEAL FROM THE 178TH DISTRICT COURT

OF HARRIS COUNTY, TEXAS

JUDGE WILLIAM T. HARMON PRESIDING

---

HEARING TO DETERMINE DEFENDANT
FOREGOING FURTHER APPEALS

Ida M. Garcia
Official Court Reporter
301 San Jacinto
Houston, Texas 77002



CAUSE NO. 375813

STATE OF TEXAS — IN THE 178TH DISTRICT COURT

VS. — OF HARRIS COUNTY, TEXAS

JAMES EDWARD SMITH — MAY TERM, A.D., 1990

A P P E A R A N C E S:

For the State: Miss Caprice Casper
Assistant District Attorney
Harris County, Texas

Also Present: Mr. Wilford Anderson
Attorney at Law
Harris County, Texas

BE IT REMEMBERED that upon this the 17th day of May, A.D., 1990, the above entitled and numbered cause came on for a hearing to determine defendant's foregoing further appeals before the Honorable William T. Harmon, Judge of the 178th District Court of Harris County, Texas; and the State appearing by counsel and the defendant appearing in person, announced ready for trial. And all preliminary matters having been disposed of, the following proceedings were had, viz:

-oOo-

THE COURT: This is Cause No. 375813, State of Texas versus James Edward Smith. You're James Edward Smith?

THE DEFENDANT: I am.

THE COURT: Mr. Smith, the last time you were before me in March of 1988 you had expressed desire to forego further appeals of your capital murder conviction, expedite your execution; is that correct?

THE DEFENDANT: That's correct.

THE COURT: And the court set an execution date and I believe your mother up in Ohio filed a petition for a writ of habeas corpus --

THE DEFENDANT: That's true.

THE COURT: -- with the Supreme Court and the stay of execution was granted at that time. Are you aware that on April 30th, 1990, the United States Supreme Court effectively dissolved the stay of execution that previously entered?

THE DEFENDANT: I'm aware of that. Thank you.

THE COURT: The purpose of this court appearance this morning is to determine whether or not you still want to -- wait a minute. Let me finish. I'm reading. I'll give you a copy of this. Is whether or not you still want to forego further appeals of your conviction or whether you want to appeal your conviction any further.

THE DEFENDANT: That's correct.

THE COURT: That's all we're doing. I'm not



setting execution.

THE DEFENDANT: I understand.

THE COURT: Okay. I'm not going to force a lawyer to represent you this morning.

THE DEFENDANT: Thank you.

THE COURT: However, I've asked Mr. Wilford Anderson who's standing by you this morning to consult with you and answer any questions that you might have should you want to talk to him at any time during these proceedings this morning. I've known Wilford Anderson for about ten years. He's a former assistant district attorney, he was chief prosecutor in several of the district courts, he has prosecuted many capital cases. He has defended how many capital cases?

MR. ANDERSON: Three, and one right now.

THE COURT: He is in the process of defending a capital case right now. He is in my opinion an expert criminal lawyer and is highly competant to advise you with regards to what all your rights are, okay? He's not somebody who doesn't know what he is doing, okay?

THE DEFENDANT: I understand what you're saying.

THE COURT: All right. Do you wish to talk to Mr. Anderson --

THE DEFENDANT: No, I do not.

THE COURT: -- before we go any further in this matter?

THE DEFENDANT: No, I do not, but I want to ask one question if I may.

THE COURT: Yes, sir.

THE DEFENDANT: Are you aware that I filed with the Court of Criminal Appeals an affidavit for -- well, not only with the Court of Criminal Appeals but with your court also two years ago and since the stay of execution was dissolved by the U.S.Supreme Court does it not revert back to the matter of execution not being planned, foregoing any evidentiary hearing, for apparently this is a hearing, some type of evidentiary hearing?

THE COURT: No, this is not an evidentiary hearing.

THE DEFENDANT: Oh, so it's not?

THE COURT: Here is the purpose of this hearing is this. The next thing that's suppose to happen is I'm suppose to set an execution data.

THE DEFENDANT: Right.

THE COURT: However, before I set an execution date which I'm not going to do this morning I'm going to order that you be given a mental status examination. In essence I want everything that was done two years ago brought up to-date, okay? I don't want anybody coming in tomorrow and saying, you know, even though Mr. Smith has told everybody that he wants to go ahead and be executed and waive any further appeals it's my opinion that he is not mentally competent to make



that decision, which would in essence stall your execution out.

THE DEFENDANT: All right.

THE COURT: So that's the reason I'm doing it. Not because I feel as though you're incompetent. I mean you and I --

THE DEFENDANT: I understand. You have to cover the bases.

THE COURT: I think you and I had so many bases over a period of six years. I mean there's no doubt in my mind you have been mentally competent, you always been mentally competent, but I think in order to just to preclude or prevent anybody else who doesn't know you from coming in here and say, well, Edward Smith is not competent to make this decision to forego his appeals based upon any conversations with him, I just want you to know I want to prevent somebody from going ahead and doing that, and that's the reason why I'm ordering a mental competency. Not because I think you are but it's because just in case anybody comes in saying that you are.

THE DEFENDANT: I understand.

THE COURT: What do you want to do with regard to further appeals of your capital murder conviction?

THE DEFENDANT: As I stated two years ago it is my desire,understanding fully the consequences of my decision to stop any further appeals, having been confirmed in the Court of Criminal Appeals, State of

Texas, I do not wish to further appeal on the appellate level of the federal government. Do not wish to do it.

THE COURT: All right. Since you have indicated that you want to forego further appeals of your conviction I'm going to order that you be given a mental status examination. Mr. Smith, I've no reason to believe that you're anything other than rational and competent to make a decision regarding abandoning your appeal efforts, however, because the death penalty is involved here I feel that you should be examined as a precautionary matter. Do you understand?

THE DEFENDANT: I understand fully, Your Honor.

THE COURT: And do you agree?

THE DEFENDANT: I agree fully with you, yes.

THE COURT: You have no quarrel with the mental competency?

THE DEFENDANT: No, as long as it is done in an expeditious matter. I don't want to spend forty days.

THE COURT: All right. More over a mental status examination shows that you understand what you were doing, that you're capable of making a rational choice about whether to continue or abandon your appeals or make it extremely difficult for some third party to try to stop you from doing what you want to do.

THE DEFENDANT: Thank you.

THE COURT: Miss Casper who represents the district attorney's office, I know that you're familiar



with who Miss Casper is, has presented the court an order for me to sign ordering a couple of psychiatrists who are employed by the Harris County Forensic Psychiatric Unit examine you over at the Harris County jail, prepare a report regarding the results of their examination, and provided that their reports come back showing that you're competent and understand the nature of the proceedings against you now, which basically is to request the court or tell the court that you wish to forego any further appeals and to request the court to go ahead and set an execution date. Once I receive that report then I'll go ahead and set an execution date which can't be for thirty days till after the date that we come back in here.

Are we going to set a date after today to come back in here? Are we going to set a date after today to come back from the --

MISS CASPER: Mr. Smith's psychiatric and psychological examination are scheduled for tomorrow.

THE DEFENDANT: Fine.

MISS CASPER: I'll be talking with Dr. Brown and Dr. Ganns about expediting their reports. If they can have them to us early next week then we'll just keep him in Harris County and bring him in next week.

THE COURT: Where did Linda go? I think Linda will go ahead and set a future date on the docket in order to keep Mr. Smith in the Harris County jail because if she didn't then what will happen is you will

be sent back to TDC.

MISS CASPER: Well, they won't send him back. They'll not send him back to TDC unless we tell them to but I'll make inquiries of Linda. I'll make inquiry this morning as to how soon this report can come back. In the event that I can't get an answer we can just set it for sometime next week.

THE COURT: All right. Mr. Smith, if the mental status examination shows that you understand what you're doing, that you're capable of making a reasonable choice about this matter, you still want to forego your appeals and expedite your execution, then I'll bring you back to this court and set an execution date in your case; do you understand?

THE DEFENDANT: I understand.

THE COURT: All right. I also want you to know that having decided to forego further appeals of your capital murder conviction that you're absolutely free to change your mind at any time and pursue your appeals and you can pursue them on your own or I'll appoint a lawyer to represent you or you can ask that -- what's the agency in Austin?

MISS CASPER: The Resource Center.

THE COURT: The Resource Center in Austin. I think you're familiar with them.

THE DEFENDANT: Yeah, I'm familiar with them.

THE COURT: To represent you. Well, I hope that any choice you make not forego any appeals is that



based upon some feeling in your part that they will not effectively represent you on appeal?

THE DEFENDANT: No, my decision is based on my personal conclusions.

THE COURT: All right. I want you to completely understand that if it's left up to me I intend to appoint the most qualified lawyer I can find to represent you on appeal. I'm not going to appoint somebody who doesn't have any idea of what he is doing and just going to go through the motions on your appeal. I would appoint somebody who would make every effort possible in order to get your conviction reversed to work for you.

THE DEFENDANT: I'm not interested in any further appeals. My decision made two years ago I stand by it. I'll not change my mind under any circumstances.

THE COURT: Okay. So you understand -- who are the doctors over there?

MISS CASPER: Dr. Brown and Dr. Ganns.

THE COURT: You seen them before?

THE DEFENDANT: I've seen Dr. Brown before, yes.

THE COURT: Dr. Ganns.I guess they'll be seeing you over at the jail sometime tomorrow or soon thereafter as they can to examine you with regards to your mental competency. I would imagine that they will talk to you about the death penalty and your appeals and whatever other thought processes you're going through to make sure that you understand what your rights are. To make sure that you understand that if there is no further appeals

of what will happen in about two weeks or soon I'll set an execution date.

THE DEFENDANT: All right.

THE COURT: And the execution will be based upon whatever date -- we get that from the AG's office?

MISS CASPER: No, thirty-one days from the date we set it.

THE COURT: Okay. So I think you can count on sometime around the first of July or middle of July of having an execution date. You're fully aware of that executions are being carried out up there?

THE DEFENDANT: That's right.

THE COURT: If I set an execution date no further appeals are taken that you will in fact be executed by lethal injection?

THE DEFENDANT: That is my desire and my hope.

THE COURT: Okay. Good luck to you, Mr. Smith. I'll see you in a couple of weeks.

THE DEFENDANT: Thank you, Judge Harmon.

MISS CASPER: Judge, you won't be here next week?

THE COURT: I'll be here Tuesday and Wednesday. I'm sorry. I'll be here Monday morning, all day Tuesday, all day Wednesday, but not Thursday and Friday.

MISS CASPER: So if we don't have Mr. Smith in by the end of next week it will be the first of the week after that.



THE DEFENDANT: Yes. All right, Miss Casper. Thank you very much.

MISS CASPER: Take care.

(Court recessed for the day)

(Whereupon, on May 23rd, 1990, court proceedings continued as follows).

THE COURT: Let's go on the record. This is Cause No. 375813, State of Texas versus Edward Smith. This is going to be a continuation of the hearing that we conducted last week. What day? Do you remember? Last Wednesday on the 17th of May. Present is Mr. Smith; and, Mr. Smith, since the 17th you have been examined by Dr. Jaime Ganns and by Dr. Jerome Brown. Dr. Brown being a clinical psychologist, Dr. Ganns being a psychiatrist; both employed by the Harris County Forensic Psychiatric Unit over at the Harris County Jail.

I have before me the original copies of their reports, both of which indicate that they find that you were competent to make a decision regarding your execution. That you have a rational as well as a factual understanding of the proceedings that are taken place. And I've given you copies of these reports. You've had opportunity to review both of these reports. Do you have any quarrel with the findings of Dr. Brown or Dr. Ganns?

THE DEFENDANT: No, I do not.

THE COURT: Is the information that they put in their reports, is it to the best of your recollection a true and accurate reflection of your interview with those two doctors?

THE DEFENDANT: Yes, for the greater part.



Only made a mistake in saying I was christian. I'm not a christian.

THE COURT: All right. Is there anything else you wanted to add to their reports regarding to their interview or do you have any quarrel with their findings in any way shape or form?

THE DEFENDANT: I've no quarrel with their findings. I think both doctors conducted a reasonable and competent interview, came to a just and reasonable conclusion in the matter.

THE COURT: All right. With regards to any further appeals of your conviction, once again you have the right to request of the court to appoint a lawyer to represent you. I'll appoint Mr. Wilford Anderson to represent you. I'll allow you the opportunity to talk with Mr. Anderson before you decide whether or not you wish any further appeals to be filed in your behalf. Do you want me to do that?

THE DEFENDANT: No, I do not.

THE COURT: All right. The next thing for the court to do then is to set an execution date. Is that what you want me to do?

THE DEFENDANT: That's my desire. Has been, continues to be. Yes, I like to have an execution date set as soon as possible. Preferably next Saturday, that's fine. I don't have any scheduled event.

THE COURT: All right. I can't set it for thirty days.

THE DEFENDANT: Cannot?

THE COURT: No, you cannot be executed for thirty days after execution is set. It has to be beyond thirty days from today's date in order for them to make preparation what has to be made in order to carry out the executions. So, I've talked to Miss Casper about what date she recommends. She has been in contact with the attorney general's office. It's my understanding that there is another inmate up there who has also voluntarily foregone further appeals. What's his name?

MISS CASPER: I don't know his name. I know his date is set for June 22nd.

THE COURT: Who is that? Do you know who it is?

THE DEFENDANT: I'm not at liberty. I don't speak about other people's cases.

THE COURT: Okay. At any rate, the date that the A.G.'s office has given Miss Casper is June the 26th, which is a Tuesday, which is approximately I guess thirty-four days from today. Is that a date that's agreeable with you?

THE DEFENDANT: Most certainly, yes.

THE COURT: All right. Then, do you have one of those judgments?

THE CLERK: Yes, sir. The order is up here somewhere.

THE COURT: I got it. I'm sorry.



It is the order of this court that you, James Edward Smith, who has been adjudged to be guilty of capital murder, who's punishment has been assessed at death in accordance with an affirmative findings of the jury and judgment of this court shall before the hour of sunrise on the 26th day of -- on Tuesday the 26th day of June, 1990, at the Texas Department of Corrections at Huntsville, Texas, be put to death by execution or designated by the Director of the Texas Department of Corrections who shall cause a substance or substances in a lethal quantity to be intravenously injected into your body sufficient to cause your death and until you're dead. Such execution procedure to be determined and supervised by the Director of the Texas Department of Corrections.

It is ordered the clerk of this court shall issue a death warrant in accordance with this sentence directed to the Director of the Texas Department of Corrections deliver such warrant to the Sheriff of Harris County, Texas, to be by him delivered to the Director of the Texas Department of Corrections at Huntsville, Texas, together with the defendant, James Edward Smith.

The defendant, James Edward Smith, is hereby remanded into custody of the Sheriff of Harris County, Texas, to await transfer to Huntsville, Texas, and execution of this sentence. Good luck to you, Mr. Smith.

THE DEFENDANT: Judge harmon.

MISS CASPER: One, for every time you read Texas Department of Corrections we like it to reflect its proper name.

THE COURT: It's the Texas Department of Criminal Justice, the Institutional Division at Huntsville, Texas.

MISS CASPER: Second of all, we like you again to admonish Mr. Smith at any time he decides, if he decides, to change his mind there will be a mechanism in effect even up to the time of the execution.

If you change your mind on the execution Judge Farmon will see you have the right to pursue your appeals.

THE COURT: You understand that, Mr. Smith?

THE DEFENDANT: I understand fully.

THE COURT: Just get in touch with Miss Casper or get in touch with me directly and I will be more than happy to grant a stay of execution, get a lawyer to represent you, let him file whatever further appeals in your behave necessary. Do you understand that?

THE DEFENDANT: I understand that.

THE COURT: All right.

MISS CASPER: All you have to do is let the T.D.C. officials know; they'll let us know, okay?

THE COURT: Okay.

THE DEFENDANT: Sounds good.

THE COURT: Good luck to you. Mr. Smith, one



last thing. I do want to make as a matter of this record these competency evaluation reports that were prepared by Dr. Ganns and Dr. Jerome Brown to be transmitted along with this judgment to the Texas Department of Criminal Justice in Huntsville, Texas.

THE DEFENDANT: Is that all, sir?

THE COURT: Yes.

THE DEFENDANT: Any possibility I can get back to T.D.C. sooner? I been here for about a week now. I have this disease factor. I haven't had any medication to alleviate the suffering. I been here a week without it.

MISS CASPER: I'll talk to Detective Curtis as soon as I go back and make arrangments to send you back either today or possibly at the earliest available date.

THE DEFENDANT: Thank you, Judge Harmon.

THE COURT: Thank you, Mr. Smith.

(Whereupon, this concludes all the testimony heard before the court on said hearing).

CAUSE NO. 375813

THE STATE OF TEXAS — IN THE 178TH DISTRICT COURT

VS. — OF HARRIS COUNTY, TEXAS

JAMES EDWARD SMITH — MAY TERM, A.D., 1990

I, Ida M. Garcia, Official Court Reporter of said court, hereby certify that the foregoing pages comprise a true, complete, and correct transcript of the proceedings had in the above styled and numbered cause.

WITNESS MY HAND this, the 20th day of May 1990.

Ida M. Garcia

Ida M. Garcia
Official Court Reporter
178th District Court
Harris County, Texas

Certificate No. 1584
Expires: December 31, 1991
301 San Jacinto
Houston, Texas 77002

(713) 221-6336



EXHIBIT 3

APPELLATE COURT NO. _____

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS



---

JAMES EDWARD SMITH,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

---

APPEAL FROM THE 178TH DISTRICT COURT

HARRIS COUNTY, TEXAS

Judge William T. Harmon, Presiding

---

STATEMENT OF FACTS

(MOTION HEARING)

(VOLUME I OF I)

Gail K. Williams
Official Court Reporter
178th District Court
Harris County, Texas



CAUSE NO. 375,813

| | |
|---|---|
| THE STATE OF TEXAS | IN THE 178TH DISTRICT COURT |
| VS. | OF HARRIS COUNTY, T E X A S |
| JAMES EDWARD SMITH | MAY TERM, A.D., 1985 |

A P P E A R A N C E S:

For the State: Mr. Roberto Gutierrez
Mr. Keno Henderson
Assistant District Attorneys
Harris County, Texas

For the Defendant: Mr. Randy McDonald
Attorney at Law
Houston, Texas

BE IT REMEMBERED that upon this the 1st day of July, A.D., 1985, the above entitled and numbered cause came on for a hearing before the Honorable William T. Harmon, Judge of the 178th District Court of Harris County, Texas; and the State appearing by counsel and the Defendant appearing in person and by counsel, announced ready and all preliminary matters having been disposed of, the following proceedings were had, viz:

THE COURT: This is Cause No. 375813, State of Texas vs. -- well, James Edward Smith, appellant, vs. State of Texas, appellee.

We're here for a hearing on the motions filed by the appellant, James Edward Smith, and I have before me two motions, the first motion being a motion for leave for pro se representation on appeal and dismissal of his court-appointed attorney, Mr. Randy McDonald.

Mr. Smith, my name is Bill Harmon. I'm currently the judge of the 178th District Court. I think you're aware of that. I was elected to replace Judge Walton when he resigned.

Do you have any additional motions that you wish to file and have me to consider at this time?

THE DEFENDANT: Not at this time, Your Honor.

THE COURT: All right. With regards to your -- to the motions that you have filed, do you wish to offer any evidence in support of your motions?

THE DEFENDANT: Well, Your Honor, I think the evidence cited and the cases cited and the law cited is sufficient in support of this motion plus my affidavit that I fully understand and I do understand the consequences and going through this -- even though it's a very delicate situation, I'm fully competent in my



own opinion, and you can use your right to have a psychiatrist examine me to find out my competency to go ahead with this pro se representation on appeal.

I don't think Mr. McDonald is doing sufficient at this time or has in the last few months. I think I have -- I am going to ask the judge I can do it on my own.

THE COURT: All right. So all you're asking the court to do at this time is to --

THE DEFENDANT: I'm asking the court at this time, Your Honor, to grant the motion to dismiss Mr. McDonald pursuant to the laws that were cited in the motion and constitutional right that I have.

THE COURT: All right. Mr. Smith, how old are you?

THE DEFENDANT: 32.

THE COURT: How far did you go in school?

THE DEFENDANT: Thirteen years.

THE COURT: Do you have any college education?

THE DEFENDANT: I'm sorry?

THE COURT: Any college education?

THE DEFENDANT: Thirteen years is one year of college.

THE COURT: Where did you go?

THE DEFENDANT: Dade County Community College, Dade County, Florida.

THE COURT: How many college credits did you get?

THE DEFENDANT: I received six credits

THE COURT: Are any of those credits in any subjects related to the practice of law?

THE DEFENDANT: No, sir, they're not.

THE COURT: Have you received any type of formal legal training?

THE DEFENDANT: No legal formal training in law.

THE COURT: So you understand that the result of your appeal will be whether or not you in fact are executed in accordance with the punishment assessed by the jury in the trial about a year ago?

THE DEFENDANT: Yes, sir, fully aware of that.

THE COURT: I furthermore understand from Mr. McDonald you have a brief prepared for the Court of Criminal Appeals.

THE DEFENDANT: I beg your pardon, sir?

THE COURT: I understand from Mr. McDonald that you have a brief prepared at this time.

THE DEFENDANT: Yes, sir. I have a brief prepared that I will submit to the Court of Criminal Appeals on the dismissal of Mr. McDonald from my case.

THE COURT: You have that brief prepared right now?

THE DEFENDANT: Which I will submit to the Court of Criminal Appeals.

THE COURT: All right. I would like to see the brief at this time.

THE DEFENDANT: This brief is not executed fully, and it will be completed and executed fully which will be submitted to the Court of Criminal Appeals at the time if and should Mr. McDonald be removed from this case.

THE COURT: All right. I want to have this stapled together and marked as an exhibit for the purposes of this hearing. We will make a copy of it, Mr. Smith, and we will return the original to you. All right?

THE DEFENDANT: Is that the -- I'm not sure if that's the correct copy I want to give.

THE COURT: Do you have a copy of it?

THE DEFENDANT: I have several copies of it, Your Honor, prepared for the appellate court. I'm not sure if that's a complete brief though I intend to submit,

however. May I see that, Your Honor?

THE COURT: Yes. I tell you what. I've got what appears to be a three-page brief right there. Also you handed me what appears to be the first pages of some copies.

THE DEFENDANT: All right.

THE COURT: So why don't you -- the material you have there --

THE DEFENDANT: When I get everything that I think you would like to have at this time then I will give it to you.

THE COURT: All right. Get then together now.

THE DEFENDANT: I do not want this to be submitted along with Mr. McDonald's brief if he intends to file one. I want Mr. McDonald taken off this case. I want to file my own brief. I don't want this submitted as a supplemental brief. If he is not taken off the case I do not want this to be submitted as a supplemental brief to anything he may file.

THE COURT: I understand that, but the reason I want it made part of the record is for the Court's determination of your competency to represent yourself on appeal.



THE DEFENDANT: I understand that fully, Your Honor.

THE COURT: Will you staple that together?

THE DEFENDANT: I don't want to file any supplemental brief to any shit you might file.

(Whereupon, Appellant's Exhibit No. 1 was marked for identification.)

THE COURT: This is the brief which is marked Appellant's Exhibit No. 1, the brief you intend to file with the Court of Criminal Appeals if I dismiss Mr. McDonald.

THE DEFENDANT: No, sir. That is a prepatory -- something I prepared that is not a general outline. It's the brief I intend to submit to the Court of Criminal Appeals in the event Mr. McDonald is dismissed from my case. That is not the actual brief -- at this time I do not think that is the actual brief I would submit to the Court of Criminal Appeals.

THE COURT: This brief says that there are no grounds of error which the appellant wishes to raise. This is --

THE DEFENDANT: I intend to file the brief, but this may not be the exact brief I intend to file to the appellate court.

THE COURT: Do you intend to file a brief that raises points of error?

THE DEFENDANT: I intend to file a brief that raises any point of error I feel pertinent that should go before the appellate court or any points of error I find that are pertinent to the case. I will raise them in the brief should I find any points of error.

THE COURT: Have you read the transcript?

THE DEFENDANT: No, sir. I have not read the transcript as of yet. I have asked Mr. McDonald on several occasions to send me some copies of the transcript. He refused to do so. He's refused to answer any of my letters or any correspondence. In my opinion Mr. McDonald has acted very antagonistic toward me in this instance, and I don't think he's working in my best interest.

THE COURT: One of the motions you filed here was a motion to dismiss your appeal.

THE DEFENDANT: That's right.

THE COURT: And you're aware I denied that motion.

THE DEFENDANT: No, I wasn't aware that you denied that motion. I did not receive any acknowledgement of that motion. I did receive a denial of my original



motion to dismiss Mr. McDonald from my case.

THE COURT: All right. You understand I denied your motion to have the Court of Criminal Appeals dismiss your appeal.

THE DEFENDANT: You did deny that motion?

THE COURT: Yes.

THE DEFENDNAT: I don't have a copy of that for my records.

THE COURT: Is it not your intention to ask the Court of Criminal Appeals to dismiss your appeal?

THE DEFENDANT: I have filed a Federal suit for that fact, yes, sir.

THE COURT: Do you have a copy of that suit with you?

THE DEFENDANT: No, sir, I do not.

THE COURT: Is it not your intention, Mr. Smith --

THE DEFENDANT: Yes, sir, it is my intention to have my appeal dismissed which is my legal right according to the Constitution of the United States.

THE COURT: So it's your intention to either have your appeal dismissed or to file a brief raising no grounds of error.

THE DEFENDANT: It is my intention to have

my appeal dismissed which is my right according to the United States Constitution or to file a brief to the appellate court raising any grounds which I see.

THE COURT: The brief you have already prepared says there are no grounds of error, and you prepared this brief without having even read the transcript. Is that not true?

THE DEFENDANT: That is true, but that brief as far as not the one I intend to submit or may not be the one I intend to submit to the appellate court.

THE COURT: Have you done all your own research, Mr. Smith?

THE DEFENDANT: Yes, sir, I've done all my own research.

THE COURT: No one has done it for you?

THE DEFENDANT: No, sir.

THE COURT: Who prepared the brief for you?

THE DEFENDANT: That copy --that portion of the brief that I have there that you have in your possession I prepared myself.

THE COURT: All right. So no one who's up at the unit where you've been assigned has been assisting you in any way?

THE DEFENDANT: Judge Harmon, I'm completely



competent enough to --

THE COURT: Answer my question.

THE DEFENDANT: No, sir, no one.

THE COURT: Nor do you have any plans to enlist the assistance of any person?

THE DEFENDANT: None whatsoever, Your Honor.

THE COURT: In the event --

THE DEFENDANT: None whatsoever.

However, in the event that it should arise that I have difficulty in some point of law that I may not be able to grasp fully I reserve the right to speak with anyone who may have better knowledge of that point of law than I have.

THE COURT: Have you asked any of the staff counsel up at TDC --

THE DEFENDANT: There are no staff counsel on death row.

THE COURT: Sir?

THE DEFENDANT: There are no staff counsel on death row.

THE COURT: Can you think of anything else, Mr. Henderson?

MR. HENDERSON: No, sir.

THE COURT: Can you think of anything else?

MR. GUTIERREZ: No, sir.

THE COURT: Mr. McDonald, do you wish to be heard?

MR. MC DONALD: No.

THE COURT: Anything else, Mr. Smith?

THE DEFENDANT: No, sir.

THE COURT: Okay. I'm going to deny your motion for leave for pro se representation on appeal.

THE DEFENDANT: On what grounds, Your Honor?

THE COURT: I am going to find that you are not competent to represent yourself to handle this appeal. I'm going to allow Mr. McDonald to continue and handle the appeal. What about -- I'm going to invite you, Mr. Smith, if you wish to file any supplemental briefs.

THE DEFENDANT: No, I'm not intending to file any supplemental briefs.

THE COURT: All I'm --

THE DEFENDANT: Your Honor, I have a constitutional right to represent myself on appeal. I have filed a suit as you are well aware I'm sure --

THE COURT: I've been made aware of that this morning.

THE DEFENDANT: -- to have my right upheld. As I said in the motion for a hearing, you are blatantly



and knowingly violating my constitutional rights which are guaranteed under the 6th and 14th Amendments of the Constitution. I am competent enough to file a brief to the appellate -- Court of Criminal Appeals in Texas. The way things are going now all Mr. McDonald is going to do is get me executed anyway. He's doing a bunch of fancy legal bullshit words. I can do that myself. You have not given me a hearing or an examination by a psychiatrist to see whether or not I'm competent, and I don't think Your Honor knows me fully well enough to say at this time I am not competent enough to proceed in this matter; and I note that the attitudes and conversations heard before in this court some 22 minutes in duration some ten minutes ago reflects again the nonsense attitude of the people of Texas and the courts, criminal justice system of this country and this state and assholes like Mr. Roberto Gutierrez here, puta, and I tell you again, Your Honor, I fully intend to pursue this matter, and I will be successful in getting Mr. McDonald, fucking ass, off my case. I don't want to hear his promises about he can get me a different fucking -- get me out of prison on appeal and gave me the same promise when he got me convicted. I'm an innocent man. I didn't do it. He knows I didn't do it. He

knows I didn't do it. You know I didn't do it. I refuse to sit up there on that fucking death row twelve fucking years while you guys play fucking games.

THE COURT: Do you want me to appoint another lawyer?

THE DEFENDANT: I want McDonald off my case, and I want to do it myself.

THE COURT: No.

THE DEFENDANT: I want to do it myself.

THE COURT: I'm telling you --

THE DEFENDANT: I want this man off my case, and I want to do it myself.

THE COURT: Okay.

THE DEFENDANT: Nothing else. That's all I want.

THE COURT: If that's all you what, that motion will be denied.

Okay. I will have the clerk to supply you with a letter -- with a copy of tha two motions. They are both essentially the same motion to dismiss McDonald and represent yourself, but you filed two motions. I've denied them both, and I will have my clerk provide you with a copy.

THE DEFENDANT: Fine, Your nonor. Then I



will see you in Federal court.

THE COURT: All right, Mr. Smith.

* * * * * * * * * * * * * * * *

CAUSE NO. 375,813

THE STATE OF TEXAS

VS.

JAMES EDWARD SMITH

IN THE 178TH DISTRICT COURT

OF HARRIS COUNTY, T E X A S

MAY TERM, A.D., 1985

I, Gail K. Williams, Official Court Reporter of said court, hereby certify that the foregoing pages comprise a true, complete, and correct transcript of the proceedings had in the above styled and numbered cause.

WITNESS MY HAND this the 1st day of July, 1985.

Gail K. Williams

Gail K. Williams
Official Court Reporter
178th District Court
Certification No. 708
Certification Expires 12-31-86
403 Caroline, Fifth Floor
Houston, Texas 77002
713-221-6336

EXHIBIT 4

CHARLES B. MUTTER, M. D., P. A.

FELLOW AMERICAN PSYCHIATRIC ASSOCIATION

SUITE 308
MERCY PROFESSIONAL BUILDING
3661 SOUTH MIAMI AVENUE
MIAMI, FLORIDA 33133

TELEPHONE (305) 858-0303

PRIVILEGED AND CONFIDENTIAL

May 31, 1978

Robert Gross, Esquire
Assistant Public Defender
800 Metropolitan Justice Building
1351 N. W. 12th Street
Miami, Florida 33125

Re: James E. Smith
Case #78 1562
25 Year Old Black Male

Dear Mr. Gross:

Pursuant to your request and authorization, the above mentioned patient was seen for psychiatric evaluation at the Dade County Jail on May 5, 1978. He was charged with robbery. I spent approximately one and one-half hours with the patient.

The patient was aware of the charge. He also knew the name of the attorney representing him. He indicated he was arrested in February, 1978, but was not aware of the date of the actual offense. He stated he believed he was told a supermarket was robbed, but he did not know which one. He stated he was in California, arrested and brought to Florida. "I borrowed a friend's truck. I got lost and brought it back three hours later. My friend called the police. The police detained me and said warrants were out for me in Dade County for robbery of a supermarket. I never robbed anybody." Careful questioning clearly indicated his awareness of the requirements of the law.

The patient denied prior legal difficulties. He did indicate on one occasion in California he was stopped for improper utilization of government identification. This charge was dismissed. He stated he had a memory lapse from September, 1977, through February, 1978. He stated he did not use drugs and did not know why this occurred. He indicated he would be willing to submit to any type of test which would help him recall these incidents, because he truly could not remember them. He did remember when he was in California, he had some bad dreams and thought there was some kind of problem. He indicated prior to his arrest he called the FBI and asked if he was wanted. They told him he was not.



Past history indicated the patient was born in Louisville, Kentucky, the fourth of eleven children. He was raised in Indianapolis, Indiana. His parents separated when he was very young. He was raised by his mother, who he described as always being outspoken. He described himself as a loner, but got along well with people. He left school in the eleventh grade, but eventually received a GED degree. He entered the U. S. Navy in March, 1972, and received an undesirable discharge in July, 1974. He indicated he was treated badly and disobeyed his superiors' orders. He received the undesirable discharge in lieu of being court martialled. He has never married. He studied Eastern philosophies and became a member of the International Society for Krishna Consciousness in 1974. He went to California in 1974 and remained there until 1976. He went to Washington, D.C., where he remained from 1976 to February, 1977. He then returned to Indianapolis for one month, and then returned to Washington, D.C. and remained until September, 1977. He remembers being interested in an African tribal group in South Carolina and indicated he went there but had a memory lapse from September, 1977, until February, 1978.

Past medical history was reviewed. The patient stated a urethral polyp was removed in February, 1977. There was no history of head injury, epilepsy or physical injuries. He stated in 1974 he used marijuana and alcohol. He also took mescaline on one or two occasions. He stated he gave this up when he joined Krishna. He denied the use of alcohol. There was no history of enuresis, pyromania or cruelty to animals.

The patient indicated he was initially seen by a psychiatrist while in the military service after an attempt to hang himself. He was hospitalized three days and subsequently released. He denied other history of psychiatric illness or treatment. He does not take any medication at the present time. He remembered an incident when he was seven years of age, feeling that a foreign spirit tried to enter his body. He was not hospitalized at that time.

Mental status examination revealed a well developed, bearded male, who understood my questions and answered in a coherent manner. He was generally cooperative. Gait was normal. Psychomotor activity was slightly increased. He was oriented in all spheres. Memory was intact, with the exception of a time lapse as previously mentioned. Fund of information was good. Affect was one of mild anxiety, but appropriate. There were no mood swings, ambivalence or autism. Thinking was organized and goal directed. I found no evidence of

hallucinations, delusions or ideas of reference. He was able to abstract simple proverbs, but was concrete when asked about more complex ones. Judgment on formal testing was fair. He had no insight into his difficulties. Diagnostic impression is schizoid individual. The patient may have had a psychotic break, but he did not show signs of this at the time I initially examined him.

On May 13, 1978, in your presence and with the patient's consent, I placed the patient into a deep hypnotic trance. A dissociative technique was utilized to determine the patient's reliability. I also checked his pulse and respiration throughout the interview. The patient was regressed to September, 1977, and moved forward in time. It was felt that revivification was too traumatic and his mind was dissociated. He was able to recall details leading to his present difficulties.

The regression revealed this individual felt a foreign spirit was possessing his body. It had done so prior to and during the time of the alleged offense. It was also discovered this same situation occurred when the patient was seven years of age. The behavior described was consistent with an individual having a psychotic break. He was brought forward in time. Post-hypnotic suggestions were given to permit him to remember incidents so he could aid and cooperate with his attorney in the preparation of his defense by recalling details at the time of the offense and prior to that time.

In summary, it is my opinion this individual is presently able to aid counsel in the preparation of his defense and stand trial. I feel he presently knows right from wrong and understands the nature and consequences of his acts. It is my opinion this individual suffered from an acute psychotic break which pre-existed the offense by at least two months. The psychotic reaction was sufficient in degree to prevent him from knowing right from wrong and understanding the nature and consequences of his acts at the time of the alleged offense. I feel he will need follow-up psychiatric care, if and when release is eventually considered, to help him maintain a state of remission. I do not think he is dangerous to himself or others in his present mental state.

Thank you for the privilege of working with this most interesting patient. Should you need additional information, please advise and I shall be willing to cooperate.

Very truly yours,

CHARLES B. MUTTER, M.D., P.A.

CBM/lkt
Enc.-Tape Summary

# HYPNOTIC REGRESSION

JAMES E. SMITH
May 13, 1978

Patient placed in a direct hypnotic trance with eye fixation method and deepened. He was reawakened and again placed in deep trance. Lamp was utilized to test depth of trance with good effect. Left hand was dissociated from body and Aron polygraph technique utilized, tested and with good effect. Respiratory rate and pulse taken throughout hypnotic session. The calendar method of regression was utilized and the patient was taken back to September 1, 1977.

The following is an abstract of the patient's verbalizations. Heading south to Oyo Tunji village. Arrived there by car September 3rd. They said a stranger is coming. They want me to work on the car - generator. They take me to the river and wash me. Orbat is the King. He walks amongst the dead. Gives the patient the reading. The first reading the wife spoke. She said I shouldn't anger the gods because I had many gods around me. (Spiritual forces) September 7th - Sunday. Tuesday - 9th reading. Must become a Babalao-High Priest. His ancestors (patient) are high priests. September 10th - head cleaning at Batala Temple. Washed with coconut chalk and oil. Back to Washington, D.C. Was in camp 17 days. Left a Saturday in September after the 20th. On 25th going back to South Carolina. They are greeting me in the village.

At this point the patient became agitated and described a different picture. There were demons (increased pulse and psychomotor activity). Melvin told me. He lives in Washington, D.C. They eat meat. They don't worship Krishna. They want me to build a house for my ancestors. They gave me the land for it. I must preach to these demons about Krishna. They are going to make me an elari (servant to the king). They give me a - they cut my face with a razor blade. (Cut any other part of body?) No. (Finger up) They want to feed my head - pigeon. I do not want to eat it. Something is wrong. There is blood on my head. (Patient becomes visibly anxious). They are going to make me a slave. (Silence - then dissociation from body with T.V.) They cut him in the head and right arm. They shave his head. They are chanting. The Oshoon Festival. They want me to go to a motel. They are having a sex orgy. I walked to the village. I do not want to participate. Something is happening in his mind. I am becoming a demon, slaughtering animals for sacrifice. A chicken, rooster and goat. James is a vegetarian. Makes slaves work in the field. Slaves to Orbagh

(King). A Gungun ceremony - bringing spirits back from the dead. He can see something. He always has seen ghosts since he was three years old. (Does he talk to ghosts?) No. (Finger up) Sometimes they try to take his body, but they are not strong enough.

Time moves forward. By the end of November he is different. He dosen't know anybody. He has to leave for a while. (Does James have in his thought process?) He might. (Is he in his body?) I don't think so. (Who is in his body?) Mhagborimi. (Pause - eyes open - patient will glare around. He was told to close his eyes and relax - what is his name - silence. He was rehypnotized and deepened.) James protested as to what happened. Memory frightened him so much he reawakened. (Was there a time when James felt possessed by Mhagborimi?) How he got back. Krishna protected me. (Began to chant - was deepened and chanting stopped.) I tried to get away from Oyotunda Village. (Was James body possessed in California?) He was fighting the demons. Krishna saved him in February. (Switch to memory - did a time come when James came to Florida?) Yes. In September. Then January. (How did James body get to Florida?) Driving a green Mercedes Benz. (Who was with James?) Alegba - an African stone god. He went to West Palm Beach for about one half hour. Sometimes in his body - sometimes Mhagborimi. (Did James come to Miami?) No. (Finger up) (Was James in his body in Miami?) No - Mhagborimi. (Tape turned over) Was going to the store - shopping center - Homestead. He takes a beer. Then he said he will take some of the money - he reaches in and takes it out. (Weapon?) No. (Times moves on) He is outside. Points his finger at the man. (Who points his finger?) Mhagborimi. (Is he still in James body at that time?) Yes. The Mhagborimi gets into other people's bodies, too, sometimes. (Where was James when this was happening?) Fighting. But not to get the Mhagborimi to stop this. (Who was strongest at that time?) Mhagborimi has a body. Mhagborimi and Alegba are the strongest. (If James was the strongest at that time, would he have taken the money?) No. (Why not?) Melvin gives him all his money. Melvin - friend in Washington.

Patient was questioned further about the offense itself. He indicated he would not commit the robbery if he were in control. He was brought forward in time to when he was arrested and asked by the police if he committed the robbery. He indicated he did not know if he did or not. Further, he stated if James was in control of the body, he would not have done so. If the Mhagborimi was in control, he would have. At the time this robbery occurred, James was fighting the Mhagborimi and the god. He further stated James did not know a robbery was committed when it was, and explained at that time he was fighting the Alegba god. He further stated someone can fight with someone else and not know what is happening, and when he was fighting with the Alegba he was outside the body.



Patient was taken back in time to 1973, the time he was discharged from military service. He was in control of his body and was not psychotic at that time. He was regressed to age seven and was able to recall that for three days someone was in control of his body. He got back in his body by prayer. The spirit in his body was jumping all over the place and once was jumping off the roof. A neighbor knew there was an evil spirit. His mother did not know. He was not hospitalized or seen for psychiatric treatment. He was eventually brought forward in time and awakened. There was a brief post-trance discussion and the interview was ended after two and one-half hours.

EXHIBIT 5



WILLIAM CORWIN, M.D., P.A.
818 DUPONT PLAZA CENTER
MIAMI, FLORIDA 33131
371-8883

May 21, 1978

Public Defender
Metropolitan Justice Bldg.
1351 N. W. 12 St.
Miami, Fl. 33125

Re: James E. Smith
No. 78-1562

Attention: Robert C. Gross
Assistant Public Defender

Dear Mr. Gross:

In accordance with your request I performed a psychiatric examination on James E. Smith at the Dade County Jail on May 19, 1978. I also discussed with Dr. Charles Mutter his findings during a hypnotic session with the patient. The following is the summary of my examination and findings.

History of his past was obtained from the patient. He stated that he is 25 years of age and was born in Louisville, Kentucky October 19, 1952. He was brought up in Indianapolis and attended school there to the 11th grade. He quit school because he felt frustrated but soon after he obtained a General Equivalency Diploma. While in school he had average grades and he denied disciplinary problems. He worked with his mother who had a dry cleaning business, for about a year. He then joined the Navy.

He served 2½ years in the Navy becoming a hospital corpsman. He received an undesirable discharge. This was the result of charges of insubordination against a petty officer. He had had previous troubles in the service of the same nature, that is insubordination. When he was asked why he reacted this way he replied that he didn't like the "racial indifference" he found in service. After his discharge he again worked with his mother for about a year. He then went to Los Angeles and enrolled in a school to become a medical secretary. After 2 weeks he was arrested on charges of auto theft and improper use of government identification. He was given a suspended sentence. He then joined a religious

group known as the Hare Krishna, studying to be a priest. He has remained with this group, serving in Temples of theirs in different States. In February, 1977 he was operated on for a urethral polyp and he recuperated with his mother. Soon after he went to South Carolina and joined another kind of religious group which he calls Yoruba. This is an African group and is involved in voodoo rites. He was reluctant to talk about his experiences there. In September, 1977 he claims to have lost his memory and he states that it has not yet fully returned.

Family history is apparently negative for nervous or mental illness. His parents separated when he was young and he has had little or no contact with his father since. His mother has cardiac problems. He also states that he has about 19 siblings from 2 mothers and the same father. He has little if any relationships with them, although he continues to have a good relationship with his mother.

Past medical history is not significant. He denies the use of tobacco or alcohol. Prior to his joining the religious group he did smoke marijuana, drank a great deal and also used mescaline. He denies the use of drugs now nor is he on medication. He continues to adhere to the same religious beliefs that he has had since 1974. He is single, and he denies sexual problems. In his earlier years he experienced both heterosexual as well as homosexual activites. However, since 1975 he has not engaged in sex at all, this being out of his religious beliefs. His interests are limited to studying philosophy. He keeps to himself and apparently has few friends.

With reference to his present situation he states that he was in San Diego, California when he was arrested and returned to Miami. This was in February, 1978. He has been told that he had robbed a supermarket in Dade County and he does not know when this occurred. Apparently some woman was involved and about $200 was taken. He has no recollection of these events. He recalls being in South Carolina in September, 1977 but does not know how he got to California from there. At the time he was arrested he had been on a beach with a friend in California who



allowed him to use his car. He got lost on the freeway and apparently the friend reported the car as stolen. He did go back and try to find him and did see him in a police car. When the police asked him for identification they checked and found that he was wanted on a charge in Florida.

He stated that he did not like to "speculate" as to the facts of the case. He hasn't seen all the evidence. He appeared reluctant to talk about his experiences in the Yoruba camp in South Carolina. He is not sure if the use of voodoo rites affected him. He has only superficial recollection of some of the things that happened. Repeatedly he denied knowledge of the events allegedly taking place in Florida.

At this time he feels a little nervous but he is not depressed nor is he suicidal. He does not sleep well. He is a vegetarian and has lost weight in the jail. He speaks of having a couple of "grayouts" where he almost passes out and feels foggy. However, convulsions are denied.

Examination shows him to be a tall, well developed but slender young adult black male. He was dressed in an undershirt and slacks and was fairly neat and tidy. He has a beard and a moustache and his hair is cropped. During the examination he sat quietly and was attentive but was not spontaneous. He replied to questions, usually speaking in a low voice but in a relevant and coherent manner. At times he appeared to be guarded in his replies but he was not grossly depressed or anxious. He appeared somewhat flat and withdrawn and rarely smiled. He was evasive when questioned about hallucinations. He stated that in the past and since childhood he has had clairvoyant experiences, in addition to pre-cognitive, and telepathic experiences. Apparently he has also had some visual hallucinations. He speaks of seeing "subtle bodies" which he finds hard to describe. He believes in spirits but he does not see himself as having any special powers.

Robert C. Gross, Esq.

Some paranoid ideas are noted, especially in connection with the charges against him. School knowledge is somewhat limited, and he found it difficult to do even simple mathematics. Fund of general information is fairly good. Insight is impaired. He does not believe that he is ill nor does he feel that he needs psychiatric treatment or hospitalization. Judgment is fairly good in terms of handling abstract ideas. He believes that being subjected to hypnosis recently has had a disturbing effect on him causing him to have unpleasant dreams.

Impression:

I believe that he is suffering from schizophrenia, paranoid in type. Evidence of emotional problems go back a number of years, and it may very well be that he suffered an attack of acute psychosis in connection with his experiences at the voodoo camp in South Carolina. He continues to show some indication of psychotic symptoms at this time such as flattening of his emotions, evasiveness, hallucinations, and paranoid attitudes. I believe he should be under observation in a psychiatric hospital where appropriate treatment can be given. The period of amnesia appears to be related to an acute psychotic state and it is likely that he was not competent mentally at this time.

Very truly yours,

William Corwin, M. D.

wc;jl

EXHIBIT 6

NORMAN REICHENBERG, PH.D., P.A.
DADELAND WEST BUILDING
SUITE 100
10631 NORTH KENDALL DRIVE
MIAMI, FLORIDA 33173

PHONE 274-9113

May 18, 1978

Public Defender's Office
Metropolitan Justice Building, #300
1351 NW 12th Street
Miami, Florida 33125

Attention: Robert C. Gross, Esq.

Psychological Evaluation of James E. Smith — Case No. 78-1562

This 25-year-old, single male was referred for psychological evaluation and was seen on 5/17/78 at the Miami Dade County Jail. He was generally pleasant and cooperative and completed all required tasks with minimal help from the examiner. He mentioned having had difficulty in terms of memory loss for a significant period of time and care was taken to evaluate the possibility of intellectual impairment as a result of "organic" factors. He indicated that both parents were living but they were divorced when the defendant was a baby: he has 9 brothers and 9 sisters but stated that he does not keep in close touch with them. He gave his present occupation as "religious student" and his religion as Viasnava, stating that he hoped to go to India and continue his religious studies and stay there.

Tests administered included the Bender Designs, HTP Drawings, a Sentence Completion Form and the Rorschach. Intellectually, he should be capable of functioning in the superior ranges with no suggestion of intellectual loss resulting from "organic" factors. The test patterns were all consistent in emphasizing chronic schizophrenic processes operating in this individual and the covert patterns suggest that dissociative behavior would be within strong psychological probabilities.



Bender Designs, HTP Drawings and the Sentence Completion items all emphasize the serious ideational turmoil and disturbance masked by religious preoccupation in this individual and suggest that schizophrenic processes are of long-standing. There were no suggestions of violence and/or of anti-social behavior noted in the protocol but the [illegible] disturbances are to be considered [illegible] and chronic.

Sentence Completion items of significance included: GIRLS or boys are only temporary bodily designations for the soul; MY MIND would be better situated placed at the Lotus feet of Sri Krsna; I AM VERY sorry to see the gross criminality in Dade County caused only by a Godless society led by Godless leaders; I CAN'T FORGET how merciful Krsna, God is supplying everything for the living entity at all times both material and spiritual worlds, and I REGRET I am not an unalloyed devotee of Lord Sri Krsna.

The Rorschach responses were consistent with the other material in suggesting serious ideational disturbances in this individual handled in terms of religiosity and suggests the long-standing schizophrenic processes. The reliance on denial, displacement and intellectualization would be in keeping with the dissociative phenomena described by the defendant. His response to Card 10 was "it looks like a trip to a hellish planet", and his handling of Card 9 was also in terms of a pure C response.

In the opinion of the examiner, the defendant [illegible] in terms of chronic schizophrenic processes that are masked by his intellectualization and his emphasis on religious preoccupation.

In the opinion of the examiner, he is only superficially capable of aiding in his own defense at the present time and the patterns suggest that the dissociative episodes described by the defendant were sincere and psychologically probable.

negligent conduct

In the opinion of the examiner, at the time of the alleged offense, he was functioning in terms of acute, psychotic regression and would not have been capable of knowing the difference between right and wrong.

In the opinion of the examiner, while he appears to be in need of psychotherapeutic intervention, there is no motivation for such help, since the encapsulated solipsicity would prevent any effective functioning in a psychotherapeutic relationship.

If there are questions concerning this report, please contact me.

NORMAN RICHTENBERG, Ph.D.

NR:ct

EXHIBIT 7

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

THE STATE OF FLORIDA

VS. # 78-1362

JAMES EDWARD SMITH

JUDGMENT OF ACQUITTAL AND ORDER PURSUANT TO RCrP-3.210 (e) (9)



IT APPEARING UNTO THE COURT that you,

JAMES EDWARD SMITH

have been found not guilty for cause of insanity by the Court sitting without a jury of the offense___ of

ROBBERY

IT IS THEREUPON THE JUDGMENT of the law and it is hereby adjudged that you are and stand acquitted of the offense___ as above set forth for cause of insanity and as provided for in Rule 3.210 (e) (9) of Florida Rules of Criminal Procedure, it is therefore,

ORDERED as follows:

1. That you receive psychiatric treatment at the Jackson Memorial Hospital Out-Patient Clinic.



FURTHER ORDERED that should you fail to observe the aforementioned conditions you will be returned to this Court for such other disposition as the Court may direct, and that the Court retains jurisdiction of the Defendant for the entry of such further orders as may be deemed proper and necessary.

DONE AND ORDERED in Open Court at Miami, Dade County, Florida, this 28th day of JULY, A. D., 19 78.

RICHARD S. NICKEY JUDGE

OFF. REC. 10115 PG 1892

EXHIBIT 8

## Affidavit of Joyce Carbonell, Ph.D.

I am Joyce Carbonell, Ph.D. and I hereby depose and say the following:

1. On June 11, 1990, I spoke by telephone with attorneys at the Texas Resource Center. Counsel transmitted all available records pertaining to James Edward Smith to me, and I conferred with them, including Eden E. Harrington, several times by telephone between June 12 and June 20 regarding Mr. Smith.

2. I have read the "Affidavit of Eden E. Harrington" dated June 20, 1990 regarding James Edward Smith, and I hereby incorporate it in its entirety as my professional opinion.

3. On or about June 20, 1990, I was unable to personally sign or prepare a report concerning my evaluation of Mr. Smith because I was travelling and could not physically arrange such a report.

I hereby swear under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

June 23/1990
Date

Joyce Carbonell
Joyce Carbonell, Ph.D.

County of Travis )
)
State of Texas )

## Affidavit of Eden E. Harrington

1. On June 11, 1990, undersigned counsel contacted Dr. Joyce Carbonell. Counsel transmitted all available records pertaining to James Edward Smith to Dr. Carbonell, and consulted with Dr. Carbonell regarding Mr. Smith.

2. Dr. Carbonell is a clinical psychologist licensed to practice in the States of Florida and Georgia. She received a B.S. degree in 1973 from the University of Rochester, and M.S. and Ph.D. degrees in clinical psychology from Bowling Green. She interned at Baylor College of Medicine in Houston, Texas in 1977-78. She also conducted post-doctoral research through the N.I.M.H. in the Application of Psychology to Crime, Delinquency, and the Criminal Justice System.

3. She is currently an Associate Professor of Psychology at Florida State University. She is the Director of the F.S.U. Psychology Clinic, and Director of the Crisis Management Unit.

4. Dr. Carbonell has been certified by the Florida Department of Law Enforcement as a Criminal Justice Standards Instructor.

5. She has published widely in a number of areas pertaining to psychological assessment in prison settings, mental health, mental health diagnosis and testing.

6. Since 1978 Dr. Carbonell has performed at least one hundred forensic mental status exams. She has been qualified as

an expert on mental health issues in state and federal courts in Florida, Mississippi, Illinois and Georgia numerous times. She has appeared as a witness for courts, the defense and the prosecution.

7. After reviewing records provided by undersigned counsel, Dr. Carbonell conferred with counsel several times by telephone. During those conversations, she conveyed the following information:

a. I have formed a professional opinion with a reasonable degree of medical certainty concerning James Edwards Smith's current mental state. My opinion is that Mr. Smith has a history of schizophrenia that appears to be paranoid in nature, marked by suicidal tendencies and religious delusions. There is also the possibility of organic brain damage, indicated by Mr. Smith's history of head injuries, drug and alcohol abuse, and symptoms of neurological damage. At this time, based on Mr. Smith's condition, it is my opinion that he is mentally ill; that this illness prevents Mr. Smith from understanding his actual legal position and the options available to him; and that this illness prevents Mr. Smith from making a rational choice among his options, that this illness.

Given Mr. Smith's mental state, it is my opinion that he is not aware of the substantive nature of his conviction or the relationship between that conviction and his pending execution. He is further unable to understand the role of counsel or to assist counsel in rendering legal representation.

b. My professional opinion concerning Mr. Smith is based in part on my review of the documents and records provided by



undersigned counsel, including:

1) Transcripts of May 17, 1990 and May 23, 1990 hearings before the 178th District Court of Harris County (Exhibit 14)[1];

2) May 18, 1990 Report of Dr. Jerome B. Brown (Exhibit 16);

3) May 21, 1990 Report of Dr. Jaime Ganc (Exhibit 3);

4) May 5, 1988 Affidavit of Dale Piper (Exhibit 17);

5) Undated Psychological Evaluation by Howard P. Blevins, Phd. and C. Yates Morgan, Phd., Texas Department of Corrections (Exhibit 5);

6) April 28, 1988 Letter by Drs. Blevins and Yates (Exhibit 5);

7) May 5, 1988 Affidavit of Randy McDonald (Exhibit 12);

8) May 4, 1988 Affidavit of Alexzene Hamilton (Exhibit 1);

9) May, 1988 Associated Press newspaper article titled "Inmates Discusses Voodoo Killings Day After Reprieve" (Exhibit 2);

10) February 7, 1984 Report of Dr. Jerome B. Brown (Exhibit 13);

11) February 7, 1984 Report of Dr. John D. Nottingham (Exhibit 18);

12) Transcript of Mr. Smith's testimony at trial in the Harris County capital murder case (Exhibit 19);

13) June 7, 1983 Report of Dr. John D. Nottingham (Exhibit 4);

14) June 14, 1983 Report of Dr. Jerome B. Brown (Exhibit 20);

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[1] All exhibit numbers refer to exhibits attached to the Petition for Writ of Habeas Corpus.

15) June 14, 1983 Sanity Evaluation of Dr. Jerome B. Brown (Exhibit 20);

16) July 28, 1978 Order of the 11th Judicial Circuit, Dade County, Florida (Exhibit 6);

17) May 31, 1978 Report of Dr. Charles Mutter (Exhibit 8);

18) May 31, 1978 Report of Dr. Charles Mutter (Exhibit 8);

19) May 21, 1978 Report of Dr. William Corwin (Exhibit 9);

20) May 21, 1978 Report of Dr. William Corwin (Exhibit 9);

21) May 18, 1978 Report of Norman Reichenberg, Ph.D. (Exhibit 10);

22) May 18, 1978 Report of Norman Reichenberg, Ph.D. (Exhibit 10);

23) May 13, 1978 Report of Dr. Charles Mutter (Exhibit 7);

c. My professional opinion is also based on my consideration of the only available psychological tests Mr. Smith has taken. The specific tests include the Bender Designs Test, HTP Drawings Test, a Sentence Completion Test, and a Rorschach Ink Image Test. Ex. 10 at 1. Dr. Reichenberg's conclusions are consistent with the diagnosis I have rendered:

> The test patterns were all consistent in emphasizing chronic schizophrenic processes operating in this individual and the covert patterns suggest that dissociative behavior would be within strong psychological probabilities.
>
> * * *
>
> Bender Designs, HTP Drawings and the Sentence Completion items all emphasize the serious ideational turmoil and disturbance masked by religious preoccupation in this individual and suggest that schizophrenic processes are of long-standing.



d. My opinion is also based on the examinations, observations and reports of other mental health professionals. These include the undated Psychological Evaluation of Drs. Blevins and Morgan of the Texas Department of Corrections -- which appears to have taken place on April 14, 1988. Their report indicates that Mr. Smith was hostile and refused to be interviewed by them in the Psychiatric Services office "because he felt the interviewers 'would scientifically analyze' him and (gesturing with his hands) 'put me [him] in a box... box me [him] in a corner." Ex. 5 at 1.

Drs. Blevins and Morgan also describe Mr. Smith's lengthy history of suicide attempts and suicidal ideation, and conclude that:

> Given his history of suicidal ideation, threats, and attempts over the last seven years, one cannot entirely rule out the possibility that his current decision to forego appeal of his execution is related to his desire to die.
>
> * * *
>
> An additional consideration is the fact that the noise of death row may be accentuated by his development of Bell's Palsy Syndrome which tends to increase sensitivity to noise in the ear of the effected side. Of course, only a neurological examination completed by a qualified specialist could confirm this hypothesis.

Ex. 5 at 3.

The final sentence of their report indicates "... further examination and evaluation of Mr. Smith, with Mr. Smith's cooperation, may be required to establish the connection between his current decision [to forego appeals] and his suicidal propensities." Ex. 5 at 3. No further examination and/or

evaluation is revealed by their report.

My opinion is also based on the numerous examinations conducted by Dr. Jerome Brown, Dr. Jaime Ganc and Dr. John Nottingham, all of which appear to be court-ordered examinations in connection with Mr. Smith's capital murder case. In his 1983 evaluation, Dr. Nottingham notes Mr. Smith's involvement with the Hare Krishna group, his belief in mysticism, and his religious conviction "that after he dies he will be reborn into another body, into another set of circumstances and he would just as soon go ahead and get that started." Ex. 4 at 2. Dr. Nottingham also reports several indications of Mr. Smith's suicidal tendencies, including his pre-trial desire to receive the death penalty. His evaluation does not indicate significant inquiry into possible connections between Mr. Smith's desire to forego appeals, mystical and religious beliefs, and suicidal ideation.

Dr. Nottingham's report in February, 1984 indicates a recent suicide attempt by Mr. Smith. He notes Mr. Smith's "current belief that suicide is his best way out", and concludes: "The chief finding in the individual then would be his consistent and determined and serious suicidal ideation at the present time." Ex. 18 at 2. Dr. Nottingham also notes that Mr. Smith declined a plea bargain, reporting:

> The subject [Mr. Smith] discussed further how he is not afraid of death, that his belief system religiously is that as soon as someone dies they are reborn into another body and his viewpoint throughout the interview is quite consistent that he has given up on the court system and has in fact decided that he will take his own life.

Ex. 18 at 1.



Dr. Brown's 1983 evaluation notes that Mr. Smith several times referred to others as "demons", and claimed to be a "religious counselor". Ex. 20 at 1-2. The evaluation does not mention suicide attempts or ideation, and reveals no inquiry into Mr. Smith's religious or mystical beliefs. Dr. Brown's February, 1984 report re-evaluating Mr. Smith indicates a recent suicide attempt and numerous threats of future self-harm. Ex. 13 at 2-3. The report also describes Mr. Smith's lack of belief in the legal "system". No inquiry into Mr. Smith's religious or mystical beliefs is indicated in Dr. Brown's 1984 report.

Dr. Brown's May, 1990 report does not reveal any inquiry into Mr. Smith's religious beliefs or suicidal ideation. In connection with Mr. Smith's decision to forego his appeals, the report notes:

> [Mr. Smith] stated "I don't want to be involved in what I perceive to be a farce and a sham of the appellate procedure"... the filing of appeals "only works to accumulate lots of money for the state from the people ... its obscene ... its done by the courts and the legislatures at the expense of the inmate who is subjected to sub-human conditions ... its physical and psychological abuse....

Ex. 16 at 2.

Dr. Ganc's May, 1990 evaluation notes that Mr. Smith belonged to a Hare Krishna group for more than five years, and later joined an African religious group to which he still belongs. Ex. 3 at 2. The report reveals no inquiry into Mr. Smith's religious beliefs or the beliefs of the African group, although Dr. Ganc mentions Mr. Smith's involvement with selling "strange objects related to voodoo, card reading and objects of this nature." Id. Dr. Ganc's report mentions a single suicide attempt in 1981 or 1982, but no

inquiry into suicidal ideation is described. Id. at 1. The report indicates that Mr. Smith stated that he drank alcohol and smoked marijuana regularly in his youth. No discussion of Mr. Smith's motivation to forego his appeals is contained in the evaluation.

My opinion is also based on the report of Dr. Mutter, M.D., P.A. Dr. Mutter is a practicing psychiatrist in Miami, Florida, who is also a member of the Fellow American Psychiatric Association. Dr. Mutter spent approximately one and one half hours with Mr. Smith. Ex. 8 at 1. Mr. Smith, during this examination, indicated that he had a memory lapse from September, 1977, through February, 1978. Id. Mr. Smith stated that he had used marijuana and the psychedelic drug mescaline. Id. at 2. He indicated that he was seen in the military service after an attempt to hang himself. Id. Mr. Smith reported an experience at the age of seven when he believed that a "foreign spirit tried to enter his body." Id. Dr. Mutter concluded that Mr. Smith is a "schizoid individual."

After interviewing Mr. Smith for a period of time, Dr. Mutter placed Mr. Smith in a hypnotic regression trance. The results of this trance are attached to Dr. Mutter's report. In the regression, Dr. Mutter reports that Mr. Smith believes that "a foreign spirit was possessing his body." Ex. 7 at 3. The abstract of the hypnotic regression evidences a severe psychotic break. A small part of the abstract indicates that Mr. Smith reported the following:

> At this point the patient became agitated and described a different picture. There were



> demons (increase pulse and psychomotor activity). Melvin told me. He lives in Washington, D.C. They eat meat. They don't worship Krishna. They want me to build a house for my ancestors. They give me the land for it. ... They are going to make me a clari (servant to the king). They give me a -- they cut my face with a razor blade. (Cut any other part of the body?) No. (Finger up) They want to feed my head -- pigeon. I not want to eat it. Something is wrong. There is blood on my head. (Patient becomes visibly anxious). They are going to make me a slave. (Silence -- then dissocociation from body with T.V.) They cut him in the head and right arm. They shave his head. They are chanting. ... I am becoming a demon, slaughtering animals for sacrifice. A chicken, rooster and goat.

Ex. 7 at 1. This obviously psychotic rambling continues at length. The abstract of Dr. Mutter fills three pages.

I share Dr. Mutter's conclusion that Mr. Smith suffered from an acute psychotic break sufficient in degree to prevent him from understanding the nature and consequences of his acts. Ex. 8 at 3.

Another report relied upon as a basis for my opinion is the report of Dr. William Corwin, M.D., P.A. Dr. Corwin is also a psychiatrist whose office and practice is in Miami, Florida. Ex. 9 at 1. Dr. Corwin discovered much the same background information as Dr. Mutter. Dr. Corwin also discovered that Mr. Smith complained of "'greyouts' where he almost passes out and feels foggy." Id. at 3. Dr. Corwin also reported that:

> [Mr. Smith] appeared somewhat flat and withdrawn and rarely smiled. He was evasive when questioned about hallucinations. He stated that in the past and since childhood he has had clairvoyant experiences, in addition to pre-cognitive, and telepathic experiences. Apparently he has also had some visual

hallucinations. He speaks of seeing "subtle bodies" which he finds hard to describe.

Id. Dr. Corwin also makes these important observations:

> Insight is impaired. He does not believe that he is ill nor does he feel that he needs psychiatric treatment or hospitalization.

Id. at 4.

Dr. Corwin's assessment corroborates and is even stronger than that of Dr. Mutter:

> I believe that [Mr. Smith] is suffering from schizophrenia, paranoid in type. Evidence of emotional problems go back a number of years, and it may very well be that he suffered an attack of acute psychosis in connection with his experience in voodoo camp in South Carolina. He continues to show indications of psychotic symptoms ... such as flattening of his emotions, evasiveness, hallucinations, and paranoid attitudes.

Id.

e. I also base my opinion regarding Mr. Smith's mental state on the reports of lay witnesses. These informants include Mr. Smith's prior attorney, Randy McDonald. Mr. McDonald stated:

> I was aware that Mr. Smith had a history of psychiatric problems. I also knew that he had been found not guilty by reason of insanity on a robbery charge in Dade County, Florida, in 1978. I also had information indicating that he suffered several head injuries for which he had been treated and which could have contributed to his mental problems. I was aware that Mr. Smith had suffered head injuries in a fall in a bank in Houston only a few months before the alleged offense...

Ex. 12 at 2. Mr. McDonald further stated that he "could see that [Mr. Smith] suffered mood swings, inappropriate and abnormal affect and deep depression." Id. at 2-3.

I also relied on the report of Alexzene Hamilton, Mr. Smith's



involved in voodoo, black magic and witchcraft.

Eddie has a history of mental problems and has also had physical accidents which may have had an effect on his mind. I know that when Eddie was in the Navy he was put into the hospital because of mental problems and I think these problems may have caused his discharge from the Navy. I am also aware that Eddie was in a car wreck in New Orleans, Louisiana in which he injured his head and that he fell and severely hurt his head in Houston in 1983.

Ex. 1.

f. To fully complete my assessment of Mr. Smith's mental state I would need direct access to him for extensive testing. I would perform or have performed the following tests:

1. I.Q.
2. Rorschach Ink Image Test
3. MMPI 2
4. WAIS-R
5. Halstead - Reitan Neuropsychological Battery
6. WMS-R
7. Audiology testing for hearing impairments
8. Mental status exam of Mr. Smith

g. I would also need access to all records of the Texas Department of Corrections pertaining to Mr. Smith's institutionalization and his physical and mental health.

8. I hereby certify that the foregoing is true and accurate to the best of my knowledge.

Eden E. Harrington
Eden E. Harrington

Subscribed and sworn to before me this 26th day of June, 1990.

Phyllis L Cross
Notary Public, State of Texas

EXHIBIT 9

# VITA

Joyce Lynn Carbonell

Business Address
Department of Psychology
Florida State University
Tallahassee, Florida 32306
Telephone: (904) 644-1042 or 644-3006

Personal Data

Born: March 29, 1951
Baldwin, New York

Education

University of Rochester B.A., Psychology, June 1973

Bowling Green State University, M.A., Clinical Psychology, March 1976
Ph.D., Clinical Psychology, June 1978

Awards and Fellowships

Meritorious Service Award from the Florida State University, Department of Public Safety, 1981

President's Award for Excellence in Teaching, Florida State University, 1980-1981

National Institute of Mental Health Post-Doctoral Fellowship, Florida State University, 1980-1981

Teaching Fellowship, Department of Psychology, Bowling Green State University, July 1976 to July 1977

New State Regents Scholarship, and Scholar Incentive Award , Board of Regents, State of New York, September 1969 to June 1973

University of Rochester Prize Scholarships, University of Rochester, September 1969 to June 1973.

Professional Affiliations

American Psychological Association, member, 1981-present.
Division 35, Psychology of Women, Division 41, Psychology and the Law, Division 2, Teaching of Psychology)
Capital Area Psychological Association, member, 1979 to 1983.

Professional Affiliations (continued)

American Society of Criminology, 1982 - present (member of Committee on Inter organizational Relations, 1985).
International Differential Treatment Association, 1979 to present (Board of Directors, 1986-1988).
American Association of Correctional Psychologists, member, 1979 to present.
Society for Police and Criminal Psychology, 1980-1983.
Southeastern Psychological Association, 1980-present.
American Psychological Society, 1990-present

Major Research and Professional Interests

Sex roles and leadership, sex roles and performance, personality testing and prediction of behavior, prediction of criminal behavior, sex roles and depression, psychological assessment.

Teaching Responsibilities

Psychology and the Law, SOP 3751; Psychology of Women, SOP 3742; Abnormal Psychology, CLP 4143; Psychology of Crime and Delinquency, PSY 5327; Intermediate Assessment, CLP 5446.

Professional Experience (Full-Time)

| | |
|---|---|
| 08/89-present | Director, Psychology Clinic, Florida State University |
| 08/85-present | Associate Professor, Department of Psychology, Florida State University |
| 09/79-07/85 | Assistant Professor, Department of Psychology, Florida State University |
| 09/78-09/79 | Post-doctoral fellowship in applications of psychology to crime, delinquency, and the criminal justice system at Florida State University with E.I. Megargee, Ph.D. |
| 08/77-08/78 | Pre-doctoral internship, Baylor College of Medicine, Department of Psychiatry, Division of Psychology |

Temporary and Part-Time Appointments and Experience

| | |
|---|---|
| 05/87-present | Consultant, Georgia Department of Human Resources, Southwestern State Hospital, Thomasville, Georgia. |
| 09/88-present | Consultant, Department of Professional Regulation, State of Florida |
| 01/86-present | Therapist, Psychological and Family Consultants. |



Temporary and Part-Time Appointments and Experience (continued)

| | |
|---|---|
| 03/86-08/86 | Consultant, Office of Disability Determination, HRS, State of Florida. |
| 03/84-12/85 | Vietnam Veterans R.I.S.E., (Readjustment Counseling, Information, Services and Education) Counseling and therapy for Vietnam era veterans and their families. |
| 8/79-present | Supervisor/Director of Crisis Management Unit, Florida State University. |
| 11/79-06/81 | Bainbridge State Hospital, (Intermediate Care Facility for the Mentally Retarded) Psychology Consultant. |
| 09/76-07/77 | Ohio State Rehabilitation Commission (Bureau of Vocational Rehabilitation), consultant. |
| 06/75-09/75 | Veterans Administration Hospital, Salem, Virginia. Clinical Psychology Clerkship (500 hours, Level III). |
| 06/74-09/74 | Veterans Administration Hospital, Lebanon Pennsylvania, Clinical Psychology Clerkship (500 hours, Level I). |
| 09/75-06/76<br>09/74-06-75<br>09/73-06/74 | Psychological Services Center, Bowling Green State University, Bowling Green, Ohio, student trainee. |
| 09/73-06/74<br>09/74-06/75 | Research Assistant Psychology Department, Bowling Green State University. |
| 06/73-09/73 | Research Assistant for Pilot Cities Project, Law Enforcement Assistance Administration, Rochester, New York. |

Grant Support

Principal Investigator, National Institute of Justice Grant # 83-IJ, CX-0001, Early Identification of Future Career Criminals ($92,000 from 9/82-12/84) (Co-principal Investigator, E.I. Megargee)

Co-principal investigator, National Institute of Justice Grant # 84-IJ-CX-0016. A Cross-Validation and test of the Generality of the MMPI Based Offender Classification System, $140,800 from 5/84-6/86) (E.I. Megargee, Principal Investigator)

Principal Investigator, Empathy and Racial Attitudes in College Students ($4009.08 from 5/86-8/86) Committee on Faculty Research Support, Florida State University.

Grant Support (continued)

Principal Investigator, Effects of Gender and Assigned Leadership on Task Performance ($1968.50 on 7/1/86 with matching funds provided by department) Florida State University Foundation President's Club.

Co-principal investigator, National Institute of Justice Grant, A Longitudinal Study of Violent Behavior. ($138,948 from 9/87-7/90) (E.I. Megargee, Co-principal Investigator).

Crisis Management Unit Grant, from University Vice Presidents to support Crisis Management Teams at Florida State University, ($16,140.00 annually, 1982-present).

Planning Grant to Develop Research Proposals, Council on Research and Creativity, Florida State University ($5,076.45 from 5/1/89 to 5/1/90).

Publications

Schuck, J., Leventhal, D., & Carbonell, J. (1978). A test of the schizophrenics ability to process information in one to two sensory modes. British Journal of Social and Clinical Psychology, 17, 243-249.

Carbonell, J. L. (1983). Jesness I-Level and MMPI Types: An Initial Attempt at Cross Classification. Criminal Justice and Behavior, 10, 285-292.

Carbonell, J. L. (1984). Sex roles and leadership revisited. Journal of Applied Psychology, 69, 44-49.

Carbonell, J. L., Megargee, E. I., & Moorhead, K. (1984). Predicting prison adjustment with structured personality inventories. Journal of Consulting and Clinical Psychology, 52, 280-294.

Chlopan, B., McCain, M., Carbonell, J.L., & Hagen, R.A. (1985). Empathy: A Review of available measures. Journal of Personality and Social-Psychology, 48, 635-653.

Megargee, E.I., & Carbonell, J.L. (1985). Predicting prison adjustment with MMPI correctional scales. Journal of Clinical and Consulting Psychology, 53, 874-883.

Megargee, E. I., & Carbonell, J. L. (1986). Predicting prison adjustment with the MMPI: A summary of three studies. The Differential View, 14, 8-15.



Publications (continued)

Beckham, J., Carbonell, J., & Gustafson, D. (1988). Sex differences in problem solving: The effects of problem context and sex role type. Journal of Psychology, 122, 21-31.

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Megargee, E. I., & Carbonell, J. L. (1988). Evaluating Leadership with the CPI. In C. D. Spielberger (Ed.), Advances in Personality Assessment: Volume 7. (pp. 203-219). New Jersey: Lawrence Erlbaum Associates, Inc.

Carbonell, J. L., Sample, J., & Higginbotham, J. (1990) Sexual harassment in the workplace: Managerial strategies for understanding, preventing and limiting liability. In J. William Pfeiffer, (Ed.) The 1990 Annual : Developing Human Resources. (pp. 225-240). SanDiego, CA: University Associates, Inc.

Reviews and Technical Reports

Carbonell, J. L. (1985). Review of the Supervisory Inventory on Safety (S.I.S.) by D.L. Kirkpatrick. In The Ninth Mental Measurements Yearbook, J. V. Mitchell, Editor, 1501-1502.

Carbonell, J. L. (1985). Review of the Supervisory Inventory on Communications (S.I.C.) by D. L. Kirkpatrick. In The Ninth Mental Measurements Yearbook, J. V. Mitchell, Editor, 1502-1503.

Carbonell, J. L. & Megargee, E.I. The early prediction of future career criminals. Final report, N.I.J. Grant, No. 83-in-ex-0001.

Megargee, E.I., Carbonell, J.L. & Bohn, M.J. The generalizability of the MMPI classification system for criminal offenders. Final report, N.I. J. grant.

Carbonell, J.L. (1990) Book review for the Journal of Postraumatic Stress.

Submitted for Publication

Carbonell, J.L. Sex Roles and leadership: The effects of a leader-model. Submitted to Personality and Social Psychology Bulletin, (currently under revision for resubmission)

Presentations

Carbonell, J.L., Leventhal, D.B., & Smith, K.S. (1976, May) Linguistic organization in schizophrenics and nonschizophrenics. Presented at the Midwestern Psychological Association Convention, Chicago, Illinois.

Presentations (continued)

Carbonell, J.L. (1980, April) A Cross-classification of the MMPI and I-Level systems. Presented at the International Differential Treatment Association Conferences, Estes Park, Colorado.

Sewell, J.D., & Carbonell, J. L. (1980). Crisis management on a university campus. Presented at the Society for Police and Criminal Psychology Annual Convention, Atlanta, Georgia.

Megargee, E.I., & Carbonell, J.L, (1981), August). Florida State University: Pre and Post Doctoral Training in Criminal Justice Psychology. Presented at the American Psychological Association, Los Angeles, California.

Carbonell, J.L. (1983, March) Sex differences in depression: An artifact of self-report? Presented at the Southeastern Psychological Association Convention, Atlanta, Georgia.

Goldstein, R.E. & Carbonell, J.L. (1983, March) The effects of sex role types on gender schematic processing. Presented at the 28th Annual Southeastern Psychological Association Convention, Atlanta, Georgia.

Carbonell, J.L. & Megargee, E.I. (1983, November) Prediction of criminal careers. Presented at the American Society of Criminology Annual Convention, Denver, Colorado.

Carbonell, J. L., Megargee, E.I., (1984, March) Use of the MMPI in predicting prison adjustment. Presented at the 19th Annual Symposium on Recent Developments in the Use of the MMPI, St. Petersburg, Florida.

Carbonell, J.L. (1984, March) Sex roles and leadership: The effects of task gender and modeling. Presented at the 30th Annual Southeastern Psychological Association Convention, New Orleans, Louisiana.

Beckham, J. & Carbonell, J.L. (1985, March). Sex differences in problem solving: The effects of problem context and sex-role type. Presented at the 31st Annual Southeastern Psychological Association Convention, Atlanta, Georgia.

Nadler, J. & Carbonell, J.L. (1985, March). A reinvestigation of Horner's motive to avoid success. Presented at the Southeastern Psychological Association Convention, Atlanta, Georgia.

Megargee, E.I. & Carbonell, J.L. (1985, April). Recent research on the prediction of criminal behavior with the MMPI. Paper presented at the Ninth Annual Meeting of the International Differential Treatment Association, Leavenworth, Kansas.



Presentations (continued)

Carbonell, J.L., Megargee, E.I. & Bohn,, M.J., Jr. (1986, March). Generalizability of the MMPI-based offender classification system with a Psychiatric Prison Population. Presented at the 32nd Annual Southeastern Psychological Association Convention, March, 1986, Orlando, Florida.

Alfonso, I., & Carbonell, J. L. (1986, March). The effects of obesity on employment decisions. Presented at the 32nd Annual Southeastern Psychological Association Convention, Orlando, Florida.

Megargee, E.I., Bohn, M.J., Jr, & Carbonell, J.L. (1986, March). A cross-validation of the generality of the MMPI-based offender classification system. Presented at the Second Annual National Institute of Justice Classification/Prediction/Methodology Conference, Denver, Colorado.

Carbonell, J.L. & Allers, C. (1987, March). Empathy and racial attitudes in college students. Presented at the 33rd annual Southeastern Psychological Association, Atlanta, Georgia.

Bruneau, R. & Carbonell, J.L. (1987, August) Is memory impaired due to the presentation of misleading information? Presented at the annual American Psychological Association Convention, New York, N.Y.

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Carbonell, J.L., & Handley, J.R. (1988, March) Provision of emergency mental health services on college campuses. Presented at the Southeastern Psychological Convention, New Orleans, Louisiana.

Carbonell, J.L. (1988, April) Correlates of Violence in a youthful offender population. Presented at the Academy of Criminal Justice Sciences Convention, San Francisco, California.

Megargee, E.I., & Carbonell, J.L. (1989, March). The Megargee MMPI typology: Current issues in theory and practice. In P. Van Voorhis (Chair), Psychological systems for classifying juvenile and adult populations: A view of the systems. Symposium presented at the meeting of the Academy of Criminal Justice Sciences, Washington, D.C.

Megargee, E.I. & Carbonell, J.L. (1989, April). Progress report on a longitudinal study of violent criminal behavior. First Annual National Institute of Justice Violent Criminal Behavior grantees conference. Palm Springs, California.

Carbonell, J.L., Megargee, E.I. & Bohn, M.J., Jr. (1989, March). Case history data and the MMPI offender based typology. Paper presented at the meeting of the Southeastern Psychological Association, Washington, D.C.

Presentations (continued)

Smith, B.M. & Carbonell, J.L. (1990, April). Religious denomination, religious fundamentalism and labeling of sexually assaultive behavior. Presented at the meeting of the Southeastern Psychological Association, Atlanta, Georgia.

Carbonell, J.L. & Megargee, E.I. (1990, May). Progress report on a longitudinal study of violent behavior. Second Annual National Insititute of Justice Violent Criminal Behavior Grantees conference. Indianapolis, Indiana.

Carbonell, J.L. (1990, June) Individual difference variables in organizational leadership. Presented at the American Psychological Society convention, Dallas, Texas.

Invited Papers

Carbonell, J.L. (1984, April). Prediction of persistent criminal offending: A progress report. Invited presentation, National Academy of Sciences Panel on Criminal Careers, Washington, D.C.

Megargee, E.I. & Carbonell, J.L. (1985, April). Recent research on the prediction of correctional behavior with the MMPI. Presented at the International Differential Treatment Association.

Carbonell, J.L. & Megargee, E.I. (1985, November). Familial and personality variables in the prediction of career criminal behavior. Presented at the Annual Meeting of the American Society of Criminology.

Megargee, E.I. & Carbonell, J.L. (1986, October). Evaluating leadership with the California Psychological Inventory. Presented at the California Psychological Inventory Conference, Asilomar, California.

Carbonell, J.L. (1986, December). Competent psychological assessment in capital cases. Presented to the Internship Seminar, Bellevue Hospital/New York University Medical School, N.Y., N.Y.

Carbonell, J.L. (1988, April). Psychologist's Role in Capital Cases. Workshop presented at the Capital Area Psychological Association, Tallahassee, Florida.

Editorial Positions

Editorial Consultant: Criminal Justice and Behavior

Reviews: Journal of Consulting and Clinical Psychology; Administrative Sciences Quarterly; The Journal of Supplementary Abstract Service; Catalog of Selected Documents in Psychology; Social Problems; Journal of Quantitative Criminology; McGraw Hill, Prentice Hall.



Editorial Positions (continued)

Editor: The Differential View: A Publication of the International Differential Treatment Association, 1979-1981.

Departmental Offices

Advisor to Psi Chi, undergraduate psychology honorary, September 1979 - June 1983.
Advisory Committee, 1980-1983.
Dedication Committee for Kellogg Research Lab, 1980-1982.
Selection Committee for Director of Clinical Training, 1981-1982, 1985-86, 1986-87.
Undergraduate Studies Committee, 1980-1984.
Interview Weekend Committee, 1986.
Clinical Search Committee, 1988
Clinical Advisory Committee 1988-1989
Admissions Commitee 1989-90

University Service

Student Conduct Committee (1980-1984, 1990 - present)
Women's Studies Advisory Committee (1980-present)
University Crisis Management Teams (1979-present)
Oral Interview Board, Florida State University Police Department (1980-present)
University Committee on Drug Abuse (1987)
Safety and Security Advisory Committee (1988-present)
Graduate Policy Review Committee for Childhood and Reading Education Department (1988-1989)

Additional Community Service and Consulting

Trainer and member, Community Crisis Response Team, Tallahassee, Florida, 1989-present.

Supervisor and Trainer for Police and Student Crisis Management teams on FSU campus, 1979-present.

Guest Instructor at Regional Law Enforcement Training Academy, Quincy, Florida (crisis intervention, stress management, domestic crisis intervention, human behavior, and victim reaction to rape and child abuse, 1980-1986).

Guest Faculty for Veteran's Administration Southeastern Regional Medical Education Center; present workshops on stress management, assertiveness training for women, time management, management of disturbed behavior

(7/81-present)

Professional Advisory Board, Rape Crisis-Refuge House, Tallahassee, Florida. 1981-1983.

Additional Community Service and Consulting (continued)

Psychology of women course; sponsored by credit program, Center for Professional Development, FSU, Winter, 1982.

Additional consultation and training for local and state law enforcement agencies.

Consultant, Women's Infant's and Children's Program, Department of HRS, State of Florida, September-October 1986.

Qualified as an expert witness on sexual harassment, spouse abuse, post-traumatic stress disorder, and prediction of dangerous behavior, psychological assessment, neuropsychological assessment.

Appointed to Second Judicial Circuit Task Force on Domestic Violence, 1987-1988.

Board of Directors, Refuge House, 1988-present.

Consultant/Instructor for Supreme Court DUI program evaluators, 1988 present

Licensure and Certification

Licensed Psychologist in Georgia, License #714, and Florida, License #PY0003114.

Certified as an instructor by the Florida State Commission on Criminal Justice Standards and Training (1985-1990).

EXHIBIT 10

**TEXAS DEPARTMENT OF CORRECTIONS**

[redacted]

April 28, 1988

Mr. Robert Walt
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Dear Mr. Walt:,

Please find enclosed the psychological report which Dr. Yates Morgan and I prepared on Mr. James Edward Smith, Ellis I Unit, Texas Department of Correction on April 14, 1988.

Sincerely,

Howard P. Blevins

Howard P. Blevins, Ph.D.
Clinical Psychologist
Central Region Supervising Psychologist
Texas Department of Corrections

C. Yates Morgan

C. Yates Morgan, Ph.D.
Correctional Psychologist
Unit Psychiatric Services Supervisor, Ellis I Unit

HPB/adj

ID #88.04.47.86

PSYCHOLOGICAL EVALUATION

Introduction:

Mr. James Edward Smith is a 28 year old black male who is currently serving under a death sentence for capital murder and aggravated robbery. He has been incarcerated at the Texas Department of Corrections death row since April 9, 1984. The purpose of this evaluation conducted on April 14, 1988 was to determine his current psychological functioning as a consequence of his decision to forego an appeal of his execution set for May 11, 1988.

Method:

Clinical interview/mental status examination; staff interviews; review of forensic reports; and review of medical and custody records.

Clinical Interview/Mental Status Examination:

Mr. Smith was interviewed for approximately ten minutes at his cell on the cell block which houses death row females. He is of average height with thin-to-moderate build. He wore his hair in a short cut manner. He was informed of the purpose of the interview. Mr. Smith asked how the interviewer was notified of the examination, and the interviewer responded that the Texas Attorney General's office, namely Robert Walt, had requested an evaluation. Mr. Smith spoke in a soft-to-normal tone, that was drowned out by the din, and therefore required numerous repetitions of words and questions. As the interview progressed, he moved from sitting on his bed to standing, to finally walking around the cell. At one point, he turned his back on the interviewers to acquire a drink of water. His eye contact was sporadic. He was repeatedly requested to come to the Psychiatric Services office for the interview, but he adamantly refused because he felt the interviewers would "scientifically analyze" him and (gesturing with his hands) "put me in a box...box me in a corner." He was quick to gesture and state that he would not be interviewed in the offices by these psychologists. His statements were sarcastic, belligerent, and at points outright hostile. Rapport with Mr. Smith was tenuous at best. His statements were not indicative of a thought disorder; comments and responses were logical and comprehendible. He became somewhat more sarcastic when asked if he had any thoughts or words spoken to him when others were not around him or present. He quickly retorted that he did "not hear voices...see things...I don't have hallucinations." In fact to emphasize his point, he pulled at his left ear and then asked the interviewer if he (the interviewer) saw anything in his ear as to mockingly ridicule the interviewer's question. Also, Mr. Smith appeared to be within the average range of intelligence. No thought disorder was evident.

Staff Interviews:

Two correctional officers assigned to the death row cell block and a nurse who has been assigned to the death row cell block for four years stated that Mr. Smith is generally social, but without any signs of aberrant or inappropriate behavior. They stated that he watches TV and attends recreation frequently where he plays basketball. There are times that he refuses to respond when

addressed. The nurse indicated that he makes numerous minor physical complaints. Compliance with medication is generally good. She stated that she had not observed any bizarre or irrational behaviors on her numerous rounds by Mr. Smith's cell.

Review of the Medical and Custody Records:

Beginning with May 1, 1984, entries of the medical record and virtually the entire chart indicate that Mr. Smith has had generally good adjustment to his incarceration. He has not been referred to or received services from Psychiatric Services. During this time, he has received one and possibly two disciplinary cases. The last case was in September, 1987 for possession of contraband, a prescription drug. He has refused participation in the death row work capable program numerous times since November 18, 1985 when the Unit Classification Committee denied him a work assignment due to a recent disciplinary infraction. In October of 1986, Mr. Smith was admitted to the TDC Hospital in Galveston, Texas and received a diagnosis of Bell's Palsy by Roderick Fabian, M.D. According to the record, the Palsy was left, unilaterally. He has been treated for an acute "acne like" rash since late March of 1988.

The Custody Record Social Services Summary of April 18, 1984 indicated that his father left home when Mr. Smith was seven years of age in 1958. He has two brothers and one sister and several half brothers and sisters, which report indicated to number about forty. Mr. Smith was born in Louisville, Kentucky and grew up in Indianapolis, Indiana. In 1975 he spent a three year term in the Navy but was court martialed at the Great Lakes Naval Air Station for insubordination and failure to report resulting in his being demoted to Specialist E1 from E3. In the report, Mr. Smith denied drug or alcohol use or abuse, and he denied any psychiatric or psychological treatment. A significant element of the Social Services Summary indicated that Mr. Smith had made an attempted suicide in Mandeville, Louisiana, in 1981 after he had reportedly driven his car into a bayou. According to the record, he stated that he had been depressed over marital problems with his common law wife. The summary also indicated that Mr. Smith stated "everybody is suicidal with time and circumstances." The report also showed that in 1980 he had committed himself into a mental institution for treatment although the cause was not specified. He also did not finish high school and only has an eleventh grade education. The Social Summary also stated that when his work abilities were assessed he stated "maybe I could build a stairway to heaven...if you don't work you don't live."

Forensic Psychological and Psychiatric Reports:

Forensic psychological and psychiatric reports, which were conducted approximately prior to his trial, were most comprehensive. The forensic psychological examination, conducted by Jerome B. Brown, Ph.D., Clinical Psychologist, found Mr. Smith to be competent for trial. However Dr. Brown's report indicated that "the defendant stated 'everybody has told me' that he could be given the death penalty ('a lethal injection') if he is found guilty." Dr. Brown assessed Mr. Smith as "his thought process appears to be intact with no signs of looseness or tangentially. No oddities or behaviors



were observed and seemed to be in no undue emotional distress". The forensic psychiatric examination was performed by John D. Nottingham, M.D. on June 7, 1983 and also was very comprehensive. Dr. Nottingham quoted Mr. Smith as stating "he would rather have the death sentence than to spend a lengthy time of his life in the penitentiary. He certainly is aware that he could get the death sentence. In fact, he stated that that is what he prefers." Dr. Nottingham's report also cites the suicide attempt of 1981 in Louisiana and also includes "he (Mr. Smith) stated he had taken thirty-two Quaaludes at that time and that while he was in the [redacted]." The report also reflected an absence of psychosis or psychological disturbance: "the subject does not have any evidence of mental defect or mental disease which would interfere with his ability to consult with his attorney in the preparation of his defense." However, on February 7, 1984 Dr. Nottingham reevaluated Mr. Smith. His forensic psychiatric examination indicated that Mr. Smith was suicidal at that time. Mr. Smith was also reevaluated by Dr. Brown on February 7, 1984. The essence of that report found "the defendant (Mr. Smith) has made numerous threats concerning self harm and disruption of the court procedings. Consequently, appropriate precaution should be taken."

Conclusions:

From the time of his evaluation in the Harris County Jail to now, Mr. Smith's adjustment to incarceration, and to the Texas Department of Corrections in particular, has been relatively satisfactory if not uneventful. He seems to be aware of his circumstances and of the consequences of his actions. Given his history of suicidal ideations, threats, and attempts over the last seven years, one cannot entirely rule out the possibility that his current decision to forego appeal of his execution is related to his desire to die. This data was derived from the very extensive Custody Social Services Summary and the forensic evaluations completed at the time of his trial. An additional consideration is the fact that the noise of death row may be accentuated by his development of Bell's Palsy Syndrome which tends to increase sensitivity to noise in the ear of the effected side. Of course, only a neurological examination completed by a qualified specialist could confirm this hypothesis. Thus, there does not appear to be any significant or demonstrable manifestations of overt psychological factors that are presently operating to facilitate Mr. Smith's decision to not appeal his case. However, further examination and evaluation of Mr. Smith, with Mr. Smith's cooperation, may be required to establish the connection between his current decision and his suicidal propensities.

Howard P. Blevins

Howard P. Blevins, Ph.D.
Clinical Psychologist
Texas Department of Corrections

C. Yates Morgan

C. Yates Morgan, Ph.D.
Psychologist
Texas Department of Corrections

TEXAS DEPARTMENT OF CORRECTIONS

Attorney General's Office
P. O. Box 12548
Capitol Station
Austin, Texas 78711

04 May, 1988

RE: James Edward Smith

Dear Mr. Wait:

Based on the findings of a Psychological Evaluation on the above mentioned Death Row inmate dated April 14, 1988, this inmate currently suffers no mental defect that would impair his recognition and comprehension of his legal alternative as this relates to his decision to forego appeal.

C. Yates Morgan Ph.D.

C. Yates Morgan, Ph. D.
Correctional Psychologist
Texas Department of Corrections

cc: Dr. Howard F. Stevens, Ph.D

(512) 463-2084

EXHIBIT 11

EXHIBIT 3

AFFIDAVIT

STATE OF INDIANA §
§
COUNTY OF Marion §

KNOW ALL MEN BY THESE PRESENTS:

Before me, the undersigned authority, personally appeared Alexis Hamilton, a person known to me to be competent to make this Affidavit, who, being by me first duly sworn, deposed as follows:

1. I am the mother of James Edward Smith. I have always called him "Eddie". Eddie is scheduled to be executed by the State of Texas on May 11, 1988. I have been told by attorneys that Eddie can make other appeals through the courts to try and stop his execution. Eddie tells me he does not want to appeal any more, that he has given up hope of ever getting fair treatment. I have not given up hope. I do not want my son to die. That is why I am filing an appeal on behalf of my son.

2. I have been told by lawyers that a judge has found Eddie incompetent to appeal through the courts. I agree with the judge's decision. Since Eddie is incompetent to appeal, I would like to file an appeal for him.

3. Throughout his life, my son has been easily led by others and highly vulnerable to suggestion. He became a part of the Hare Krishna cult for several years, and then became involved in voodoo, black magic and witchcraft. These types of activities are totally contrary to what Eddie was taught as a child.

4. Eddie has a history of mental problems and has also had physical accidents which may have had an effect on his mind. I know that when Eddie was in the Navy he was put into the hospital because of mental problems and I think these problems may have caused his discharge from the Navy. I am also aware that Eddie was in a car wreck in New Orleans, Louisiana in which he injured his head and that he fell and severely hurt his head in Houston in 1983.

5. My most recent knowledge of Eddie's mental problems concern events that happened after his trial. In April 1984 Eddie wrote to me asking me to contact various organizations, including the American Civil Liberties Union, to help him with his case. His letters to me during this time were friendly and upbeat and showed respect for Jesus and God and the values he had learned at home. In July 1985 Eddie called me from Houston and said he was working hard on his appeal.

6. Approximately one year later, in August 1986, I drove to Huntsville to visit with Eddie. We spent approximately 2½ hours together. Normally Eddie and I get along well and talk freely. During this visit, however, Eddie talked very little and just stared at me or stared off into space. It was very uncomfortable. I tried to talk to him and get him to talk back but for the most part he refused. This was very unusual behavior for Eddie and it made me doubt whether he was in full control of his faculties.

7. Soon after this meeting, Eddie's letters became mean and ugly. He told me to leave him alone and not to try and help him. He cursed Jesus and told me never to mention religion to him in my letters. He also wrote me and said he was going to drop his appeal and let the State kill him.

8. During this time, Eddie had a stroke in prison. I talked on the phone to a man who said he was the warden of the prison. The warden said that Eddie had a stroke and was put in the hospital.

9. The sudden change in Eddie's attitude about his appeal, the change in his letters to me, his stroke in the prison, and his previous mental problems make me think he is no longer competent to handle his appeals or make a decision to give up his appeals. For these reasons I would ask the Court to let me continue his appeals for him.

Executed this 4th day of May, 1988.

Alexis Hamilton
ALEXIS HAMILTON

STATE OF INDIANA §
§
COUNTY OF Marion §

This instrument was acknowledged before me on this 4th day of May, 1988 by Alexis Hamilton.

Troy O. Grundy, Notary Public in and for Marion County, Indiana

My Commission Expires: 08-25-1990

EXHIBIT 12

RD9/cl

## AFFIDAVIT OF RANDY MCDONALD

COUNTY OF HARRIS *
*
STATE OF TEXAS *

RANDY MCDONALD, being duly sworn according to law, deposes and says:

1. I am an attorney at law duly licensed to practice my profession in the State of Texas. My business address is 2701 Fannin St., Houston, Texas 77002.

2. I was the lead defense attorney for James E. Smith in Case No. 375,813 in the 178th District Court of Harris County, Texas, in which Mr. Smith was convicted of capital murder and sentenced to death.

3. Before trial, I was aware that Mr. Smith had a history of psychiatric problems. I also knew that he had been found not guilty by reason of insanity on a robbery charge in Dade County, Florida, in 1978. I also had information indicating that he had suffered several head injuries for which he had been treated and which could have contributed to his mental problems. I was aware that Mr. Smith had suffered head injuries in a fall in a bank in Houston only a few months before the alleged offense and that he had recovered damages through a civil action against th bank. In addition, from my own interactions with Mr. Smith, I could see that he suffered mood swings, inappropriate and abnormal affect and deep depression. It was for these reasons that I moved for a competency and sanity examination of Mr. Smith before trial.

4. Mr. Smith's actions during the trial confirmed my views that he suffered from psychiatric problems. He continued to display inappropriate affect and mood swings. Moreover, during the voir dire of prospective jurors, when a juror was excused for cause upon the State's motion, Mr. Smith ran from the courtroom and escaped from the courthouse. After he was placed in a holding cell, Mr. Smith attempted to commit suicide by biting the inside portion of his elbow to sever the artery causing a deep puncture wound. He also displayed a highly depressed mental state indicating that he did not care about the outcome of the trial. Because of my belief that Mr. Smith was of doubtful competence and sanity, I again moved that he be examined by mental health professionals.

5. The defense did not present any evidence of Mr. Smith's mental and emotional impairments at the sentencing phase of the trial. We chose not to present such evidence for the following reasons:

(a) We decided early in our representation of Mr. Smith that we would not present evidence of mental illness or impairment in the penalty phase of the trial, no matter how strong it was, because we believed the jury would not be charged so as to be able to consider such evidence as a mitigating circumstance.

(b) By the time this case was tried in 1984, the State's use of psychiatrists, such as Dr. William Grigson, to show that a capital defendant would likely be dangerous in the future was well known. Whatever the disorder suffered by a capital defendant, from antisocial personality disorder to major mental illnesses like schizophrenia, psychiatrists like Dr. Grigson, were able to persuade juries that any disorder increased the likelihood that the defendant would be dangerous in the future. Our fear was that once the jury found that mental illness increased the likelihood of the defendant's future dangerousness, the jury was obliged to answer Special Issue 2 "yes". Through the use of witnesses like Dr. Grigson, therefore, the State would be able to convert otherwise mitigating evidence like mental illness into evidence in support of an aggravating circumstance.

(c) Since the jury was able to consider only one other question in Mr. Smith's case -- the deliberateness question posed by Special Issue 1 -- we were convinced that even if we did present evidence of mental illness at the sentencing phase, with the problems attendant to Special Issue 2, the jury would still have no meaningful way of considering the mental illness evidence as a mitigating circumstance. The jury could quite readily find that the homicide was sufficiently deliberate to answer Special Issue 1 "yes" even if Mr. Smith did suffer from a severe mental illness. In our experience, it was rare for jurors to find mental illness so incapacitating as to interfere with a defendant's ability to commit deliberate acts. And if the jury answered Special Issue 1 "yes", having already answered Special Issue 2 "yes", the death sentence was mandatory.

(d) Moreover, it was my belief that the evidence the State presented regarding Mr. Smith's future dangerousness apart from the fact of the instant offense, was insufficient to establish beyond a reasonable doubt an affirmative answer to Special Issue 2. Evidence of Mr. Smith's mental illness would have introduced potentially aggravating evidence under Special Issue 2 on matters that otherwise would not have been presented.

(e) Given these considerations, we decided that Mr. Smith's interests could not be served by presenting evidence of any mental illness from which he suffered. On the one hand, the jury could be forced to treat such evidence as aggravating under Special Issue 2, and on the other, the jury was extremely unlikely to consider mental illness as negating the deliberateness of the crime. The jury was given no third option under the Texas statute to resolve these differences. It could not consider whether the evidence of mental illness was substantial enough as a mitigating circumstance to call for a life sentence, even in the face of the affirmative findings on the special issues. Thus, we could conceive of no way that such evidence could help Mr. Smith.

6. If, on the other hand, Texas had offered such a third option to the jury, our strategy would have been different. We would very likely have presented evidence of Mr. Smith's mental illness. Even though, in such circumstances, evidence of mental illness might still have increased the possibility that the jury would find that Mr. Smith posed a threat of future violence, the evidence could have served as an even stronger countervailing factor -- as a reason to impose a life sentence that was weightier than the reason to impose death because of the threat of future dangerousness.

7. Regarding Mr. Smith's present mental competence, I have no reason to believe that his mental condition has improved since the trial. Moreover, at a hearing in 1985 concerning Mr. Smith's motions to withdraw his direct appeal and proceed pro se, the trial court found that Mr. Smith was incompetent to act in his own behalf. I have only seen Mr. Smith one time since that hearing; when the trial court recently set his execution date. At that most recent hearing, Mr. Smith refused to speak to me. I can only say that his affect still appeared abnormal and inappropriate. I believe that an inquiry should be made by the court concerning Mr. Smith's competency and sanity at this time.

RANDY MCDONALD

SUBSCRIBED AND SWORN to before me on this the 5th day of May, 1988, to which witness my hand and official seal of office.

CHARLENE SVEC
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
DEC. 17, 1991

Notary Public in and for
State of Texas

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ALEXZENE HAMILTON,
AS NATURE MOTHER AND NEXT FRIEND TO
JAMES EDWARD SMITH,

Petitioner;

V.

STATE OF TEXAS,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served by hand upon the Office of the Attorney General, Enforcement Division, Supreme Court Building, Austin, Texas, this 23 day of June, 1990.

Jeffrey J. Pokorak

89-7838

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

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**ALEXZENE HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND OF JAMES E. SMITH,**

Petitioner,

v.

**THE STATE OF TEXAS,**

Respondent.

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On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

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# RESPONDENT'S OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General for Litigation

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

*ROBERT S. WALT
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

*Counsel of Record

31pp

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

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**ALEXZENE HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND OF JAMES E. SMITH,**

Petitioner,

v.

**THE STATE OF TEXAS,**

Respondent.

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On Petition For Writ of Certiorari
To The Texas Court of Criminal Appeals

---

**RESPONDENT'S OPPOSITION TO APPLICAT FOR STAY OF EXECUTION**

---

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein,[1] by and through its attorney, the Attorney General of Texas, and files this Opposition to Application for Stay of Execution.

**OPINION BELOW**

The opinion of the Texas Court of Criminal Appeals dismissing Hamilton's state collateral application for stay of execution is not yet reported and is attached hereto as Appendix A. The state trial court's findings, adopted by the court below, are attached hereto as Appendix B.

**JURISDICTION**

Hamilton seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

**STATEMENT OF THE CASE**

Smith was indicted in Harris County, Texas, for the murder of Larry Don Rohus, while in the course of committing and attempting to commit the offense of robbery. In June, 1983, and again in February, 1984, during the trial, Smith was examined by two court-appointed mental health experts, Dr. John Nottingham, a psychiatrist, and Dr. Jerome Brown, a clinical psychologist. In their four reports, **see** Appendix B, Exhibit G, both doctors concluded that Smith was fully competent. Dr Nottingham found Smith keenly aware of the legal proceedings and the possibility of a death sentence; indeed, Smith made clear that he would prefer a death sentence over life imprisonment, undoutedly due to his religious belief in reincarnation. Dr. Nottingham found Smith to be clear of speech, of above-average intelligence, logical, spontaneous and demonstrating no looseness of associations, and not delusional, "unless you want to consider his unigue religious view as delusional." Consequently, Dr. Nottingham stated there was no evidence that Smith suffered from any mental disease or defect that would interfere with his ability to consult with counsel and prepare a defense and that Smith had a

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[1]For clarity, purported "next friend" shall be referred to herein as "Hamilton," real party in interest James Smith as "Smith," and Respondent as "the state."

rational and factual understanding of the charges against him. Dr. Brown agreed, adding that Smith had a rational and factual understanding of the legal proceedings that were taking place. Neither Dr. Nottingham's nor Dr. Brown's conclusionss changed when they examined Smith after his attempted escape and possible suicide attempt, though Dr. Brown suggested precautions should be taken in light of Smith's threats of self-harm.

Smith was found guilty of capital murder by a jury after entering a plea of not guilty. After a separate hearing on the issue of punishment, the jury answered affirmatively the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (b) (Vernon Supp. 1990). Accordingly, the trial court sentenced Smith to death by lethal injection as required by law. The Court of Criminal Appeals affirmed the conviction and sentence on direct appeal. **Smith v. State**, 744 S.W.2d 86 (Tex.Crim.App. 1987).[2] Smith did not seek certiorari review in this Court.

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[2]Smith attempted to represent himself on appeal. During a hearing in the trial court to determine whether he could proceed on appeal **pro se**, Smith provided the trial court with a brief in which he raised no grounds of error. When questioned by the trial court, Smith responded that he wished to waive his right to appeal, which he termed a constitutional right, or represent himself and file a brief raising no grounds of error, which is the substantial equivalent of waiving appeal. Thus, far from "wildly vascillating" on the issue, as claimed by Hamilton, Smith merely argued alternative grounds to achieve the same end. In any event, it is clear that allowing Smith to represent himself on appeal would have subverted Texas law, inasmuch as state law requires the Court of Criminal Appeals to review the conviction and sentence. Even under **Faretta v. California**, 422 U.S. 806

(Footnote Continued)



The trial court scheduled Smith's execution for May 11, 1988. At the time of the scheduling of his execution, Smith repeatedly indicated his desire to waive further attacks on his conviction and sentence and to have the execution carried out. **See** Appendix B, Exhibit A. Thereafter, on April 14, 1990, Smith was evaluated by two prison psychologists, Drs. Howard Blevins and Yates Morgan. **See** Appendix B, Exhibit H. Both mental health professionals concluded that Smith did not suffer from any mental disease or defect that would impair his ability to rationally choose to forego further appeals.

On April 21, 1988, Smith filed with the trial court, the Court of Criminal Appeals, and the United States District Court for the Southern District of Texas, Houston Division, his "Affidavit Brief to Contest Third Party Intervention." **See** Appendix B, Exhibit B. In the affidavit he again expressed a desire to have his execution carried out and expressly rejected the proposed attempts of third parties to intervene on his behalf to try to stop the execution. On May 5, 1988, without seeking relief in the state trial court, Hamilton, Smith's mother, claiming to be

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(Footnote Continued)
(1975), and its progeny, a defendant is not allowed to use a right of self representation as a means of disrupting orderly procedures. The trial court clearly denied Smith his right to proceed **pro se** because he would subvert state law, not because there was any evidence of mental incompetency. Moreover, Hamilton's assertion in her petition, **see** Petition at 26, that the trial court in 1985 determined that Smith was mentally incompetent to forego further appeals is an outright misrepresentation. As a matter of state law, regardless of his competence, no person receiving a death sentence may forego direct appeal, which is what Smith was seeking in 1985.

acting as "next friend" on behalf of Smith, filed in the Court of Criminal Appeals an emergency application for stay of execution and, alternatively, petition for writ of habeas corpus. The court denied the requested relief on May 9, 1988.[3] Hamilton then filed a petition for writ of certiorari and sought a stay of execution in this Court. This Court stayed Smith's execution on May 10, 1988, **Hamilton v. Texas**, 485 U.S. 1042, 108 S.Ct. 1761 (1988), but denied the petition for writ of certiorari on April 30, 1990. **Hamilton v. Texas**, ___ U.S. ___, 110 S.Ct. 1958 (1990).

On May 17, 1990, Smith appeared before the trial court for the purpose of determining his desire regarding further appeals and his competency to forego further appeals, if he so chose. Smith reaffirmed his desire to forego further appeals and to not be represented by counsel. The trial court, as a precautionary measure, ordered Smith examined by a psychiatrist and a

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[3]Hamilton asserts that this "denial" demonstrated that the Court of Criminal Appeals accorded her "next friend" status because the cause would have been otherwise dismissed. This is highly unlikely. Hamilton's actions in filing at the eleventh hour directly in the Court of Criminal Appeals, which is not a fact finding tribunal entitled to hear evidence, **see Ex parte Rodriguez**, 334 S.W.2d 294 (Tex. Crim. App. 1960), left that court with limited options: either dismiss the action and require Hamilton to proceed in a procedurally proper fashion, an impossible task in light of the lack of sufficient time to so act before the execution, or deny the relief to allow Hamilton to seek relief in this Court. The Court of Criminal Appeals most likely chose the latter course, and its unequivocal rejection of Hamilton's standing as next friend in this case, after she proceeded in a procedurally proper fashion, strongly supports this conclusion.



psychologist to determine his competency to make such a decision. After separate examinations, both mental health experts reported to the trial court that Smith suffered from no mental disease or defect and was fully competent to make a rational choice to forego appeal. Consequently, on May 23, 1990, the trial court scheduled Smith's execution for June 26, 1990.[4]

Despite the mental status reports establishing Smith's competency and the trial court's abundance of caution in assuring itself that Smith is competent, Hamilton, again claiming "next friend" status, at 4:00 p.m. on June 20, 1990, less than six days from the scheduled execution and only three working days before the execution, filed an application for stay of execution, a motion to compel psychiatric examination and a state habeas corpus application on her son's behalf. The trial court entered detailed factual findings and legal conclusions, finding Smith to be competent to be executed, that Smith is not suffering from any mental disease or defect, that Smith understands his legal position and options and demonstrates the ability to make a rational choice among those options. The trial court further found that the 1978 reports by Florida doctors presented by Hamilton were too remote to be beneficial to the inquiry on Smith's **current** mental status, that the affidavit of Dale Piper,

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[4]A transcription of the May 17 and 23 proceedings in the trial court is located in Appendix B, Exhibit D, and the reports of the mental health experts, Dr. James Grant, a psychiatrist, and Dr. Jerome Brown, a psychologist, are located in Appendix B, Exhibit E.

whose status as an expert was rejected by the trial court, was wholly conclusory, was not based on Piper's personal examination of Smith, and was entitled to no weight in the determination of Smith's current mental status, that Hamilton's attorney's affidavit recounting a Florida psychologist's opinion, based upon review of records, that Smith is not competent, even if considered competent evidence,[5] was not based on first-hand examination of Smith, was conclusory, and was insufficient in warrant a hearing or additional psychiatric examination. Consequently, the trial court concluded that Hamilton lacked standing as a next friend because Smith was fully competent to waive further appeals, Smith, in fact, knowingly, intelligently and voluntarily waived his right to forego further appeals, and Smith was competent to be executed. Thus, the trial court concluded that Hamilton's "next friend" application should be dismissed for want of jurisdiction. **See** Appendix A. The Court of Criminal Appeals, determining the trial court's findings to be supported in the record, ordered the application dismissed. **Ex parte Hamilton**, No. 14,380-02 (Tex. Crim. App. June 22, 1990). It is from this

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[5]The trial court properly chastised Hamilton's current counsel for testifying by affidavit as a "fact" witness to express a non-witness' expert opinion. Dr. Joyce Carbonnel's opinion, if it exists, was properly termed "rank hearsay." Moreover, this case raises the prospect of serious ethical oversights by, at the very least, Smith's attorney in his 1978 Florida robbery prosecution. The reports of three Florida doctors, contained in Hamilton's Exhibit 10, are not public records, but were revealed by the Florida Public Defender by telefax on June 18, 1990, without a waiver of either attorney or physician confidentiality by Smith.



dismissal that Hamilton seeks certiorari review and a stay of execution.

## STATEMENT OF FACTS

The facts adduced at trial regarding Smith's commission of the capital murder of Larry Don Rohus as well as the evidence offered at the punishment phase of Smith's 1984 trial are accurately set forth in the opinion of the Texas Court of Criminal Appeals as follows:

> A review of the record reveals that Smith was charged with killing Larry Don Rohus, the district manager for Union Life Insurance Company during the robbery of the company's offices. Debra Rene Wilson, the only eyewitness to the offense, testified that she and Rohus were alone in the outer office of the company at approximately 1:00 p.m. on March 7, 1983. As she was counting money in the cash drawer, she heard the sliding glass window, being pulled open. Looking up, she saw a man standing outside the window, wearing a stocking mask over his head. The man, who was pointing a gun at her, cocked the gun and told her to give him all of the money. Wilson related that she instantly panicked and ran behind a filing cabinet. Rohus, who was sitting at a secretary's desk turned to Wilson and told her to give him the money. When Wilson did not move from behind the filing cabinet, Rohus got up and went to the cash drawer. He removed some of the money and holding it in his hand went back towards the window. The gunman told him to put it into a container so Rohus emptied a small trash can that was lined with a plastic bag and put the money inside. He then placed the can on a table near the gunman and began walking towards Wilson. Before the could reach the filing cabinet, however, the gunman instructed Rohus to return to the window. Rohus turned around and began pleading with the gunman not to shoot him. The gunman then said something to Rohus which Wilson was unable to hear. As Rohus began fumbling with his wrist as if to take off his diamond identification bracelet, a gunshot range out.

Rohus began running back towards Wilson and the gunman fired a second shot. After the second shot, Rohus fell to the floor mortally wounded. Medical testimony showed that Rohus died of one gunshot wound to the upper left side of the chest.

Jose Montalvo, a supervisor with Union National Life Insurance Company, testified that he was in his office when he heard gunshots and screams coming from the cashiers office. Montalvo related that he came out of his office just in time to see Smith, who was holding a gun, back away from the sliding glass window. Montalvo followed Smith out of the office and downstairs. There he was joined in the pursuit by a business man named Robert Lawson. Montalvo and Lawson pursued Smith outside, across a vacant lot and into an apartment complex. A group of workmen working on the apartment complex also joined in the pursuit and appellant was apprehended and disarmed near the complex. Montalvo testified that while he was chasing Smith through the apartment complex, he saw Smith turn around at one point and aim his gun at him. Montalvo testified that he ducked behind a corner of the building. Then he heard gunfire. When he looked around the corner he saw that Javier Ramos and the rest of the workmen had Smith down on the ground and were struggling with him. Lawson, the businessman who joined in the chase, testified that he saw appellant turn and aim his gun at both him and Montalvo while they were chasing Smith across the vacant lot.

Javier Ramos, the foreman of the crew working on the apartment complex, testified that he and his men joined in the pursuit after Montalvo called for help. One of his men, Rafael Gutierrez, was the first one to catch up with Smith. When Gutierrez grabbed Smith, Smith aimed his gun at Gutierrez's chest. Ramos testified that he heard the gun click twice. Smith then turned and pointed his gun at Ramos. Ramos related that he told Gutierrez to knock Smith down. Gutierrez came up behind Smith and grabbed him and then the three men began struggling. During this time Smith was trying to knock Gutierrez down with the gun. Ramos grabbed the gun to keep Smith from hitting Gutierrez with it. During



this struggle, Smith pulled the trigger of the gun again and this time the gun fired, with the bullet passing between Ramos' legs. When Smith attempted to pull the trigger again, Ramos put his hand in the way of the hammer so that when appellant pulled the trigger, the hammer hit the web of the skin between Ramos' thumb and forefinger. Smith was eventually wrestled to the ground and released his grip on the gun only after Ramos bit him in the hand.

Further evidence at the guilt-innocence phase of the trial showed that during the late afternoon of February 3, 1984, while the voir dire examination of the jury in the instant case was being conducted, Smith suddenly jumped up from his chair at the counsel table and ran from the courtroom. Deputy Sheriff J. L. Byford and an assistant district attorney pursued Smith down one flight of stairs and out of the annex court building. The two men pursued Smith for approximately four blocks before they lost sight of him. Meanwhile two Houston bondsmen were driving down the busy city street when the spotted Deputy Byford pursuing Smith. They lost sight of Smith for awhile, but spotted him shortly thereafter exiting from the passenger's side of a van which was stopped at a red light. One of the bondsmen gave chase. A Houston police officer who was directing traffic nearby also joined in and eventually tackled and apprehended Smith. Marilyn Grigsby, the driver of the van testified that she was stopped at a red light when Smith ran in front of her van and around to the passenger's side and got in. He asked her to give him a ride. Grigsby testified that she was frightened and after going one block in the stop and go traffic, she asked Smith to get out. He did so. Subsequently Grigsby saw Smith apprehended by the Houston police officer.

The only evidence presented at the punishment stage of the trial by the State consisted of the testimony of Deputy Sheriff Neil Picquet. Picquet testified that on January 17, 1984, he went to the basement holdover cell to escort Smith to the third floor of the Harris County Courts building. Smith refused to allow Picquet to handcuff

his hands behind his back. After Picquet forcibly handcuffed Smith, he asked Smith what he was charged with and what his name was. Smith replied that he was charged with capital murder. Then Smith remarked "I kill people like you." Smith repeated this remark as they were riding up in the elevator. When they reached the third floor of the building, Picquet informed his supervisor of Smith's conduct and threats. Picquet then told Smith than an incident report would be filed against him, and Smith replied, "Fuck you."

Smith took the stand during the punishment stage of the trial and testified that he was thirty-one years old at the time of the trial, that he was one of twelve children and that his parents had divorced when he was very young. He related that he had left home when he was fifteen and had traveled extensively throughout the world. Smith further testified that he served in the United States Navy from March 1972, until June 7, 1975, when he was given a dishonorable discharge because he had struck an officer. Finally Smith testified that he had no prior criminal convictions.

**Smith v. State**, 744 S.W.2d at 87-89.

I.

**THE "NEXT FRIEND" HAS NO STANDING TO INVOKE THIS COURT'S JURISDICTION.**

Hamilton asserts that she has standing to pursue this action challenging the validity of Smith's conviction and sentence for three reasons. First, she claims direct injury that will result from the execution of her son, "the death of a loved child." Second, she claims direct injury if her son is executed after an "incomplete and state controlled sham hearing regarding her son's capacity to forego further appeals." Third, she claims standing as a next friend because, she alleges, Smith is not competent to waive further appeals. While the state has no doubt that



Hamilton will be affected by her son's demise, such an injury will not confer standing on Hamilton in her own right.

> We realize that last-minute petitions from parents of death row inmates may often be viewed sympathetically. But federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in special circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking.

**Demosthenes v. Baal**, ___ U.S. ___, 110 S.Ct. ___, No. A-857, slip op. at 6 (June 3, 1990); **see also Whitmore v. Arkansas**, ___ U.S. ___, ___, 110 S.Ct. 1717, 1728 (1990) (". . . we think the scope of any federal doctrine of 'next friend' standing is no broader than what is permitted by the habeas corpus statute, which codified the historical practice."). The Revision Note to 28 U.S.C. §2242 specifies that the language "or by someone acting in his behalf" refers to "next friend" practice by citation to **Collins v. Traeger**, 27 F.2d 842, 843 (9th Cir. 1928); **United States ex rel. Funaro v. Watchorn**, 164 F. 152, 1154 (S.D.N.Y. 1908). **Whitmore**, ___ U.S. at ___, 110 S.Ct. at 1727. Hence, this Court lacks jurisdiction to consider Hamilton's petition unless she is acting on Smith's behalf, i.e., establishes "next friend" status.[6]

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[6]Any claim that Hamilton has standing because her personal due process rights were abridged in the state courts because she did not receive notice that Smith was to receive an execution date or be evaluated by Drs. Ganc and Brown is frivolous. (Footnote Continued)

**A. The state hearing conducted in this case met constitutional requirements.**

Acknowledging that the trial court's and Court of Criminal Appeals' findings are dispositive of her claim of "next friend" standing, Hamilton attacks the procedures by which this determination was made. She complains that (1) she was not notified that an execution date would be scheduled and that Smith would be examined for competency and the habeas court did not conduct an "adversary" hearing; (2) the trial court had prejudged the question of competency; and (3) the state withheld "exculpatory" information from the trial court and the examining experts.

First, Hamilton states no legal basis for requiring that a nonparty be notified of a proceeding. In addition, this Court's precedent provides no support for Hamilton's apparent argument that as soon as a "next friend" makes any allegation, no matter how conclusory, of the death-sentenced inmate's incompetence, there should be an automatic entitlement an adversary proceeding,

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(Footnote Continued)
Hamilton has **never** been accorded representative status, as a conservator, guardian or "next friend," by any judicial authority, state o. federal. The state and state courts gave notice to the one person who was entitled to it, James Edward Smith. Moreover, Hamilton did appear in the state courts and presented her "evidence" in an attemptt to raise a **bona fide** doubt as to Smith's competency and urging further mental status examination and a hearing. Any notice defect was thus cured by her actual participation in the state proceedings. Finally, Hamilton's asserted interest in the integrity of state court proceedings regarding Smith's controversy is no greater than that of any other Texas citizen, but it cannot be argued that every Texas citizen has independent standing to seek review of Smith's conviction and sentence against his wishes. Ultimately, this assertion is no more than a variation of her claim that her familial relationship with Smith suffices to establish standing.



including a competency examination performed by the "next friend's" expert and a hearing. To the contrary, before a court is required to order an examination of the inmate, a certain threshold showing must be made; this is especially true where, as here, the inmate has previously been found competent. **See Ford v. Wainwright**, 477 U.S. 399, 426 (1986) (Powell, J. concurring) (states may require a substantial threshold showing to trigger process for determining competence to be executed). Respondent submits that Hamilton did not make such a showing in the state courts and makes none now.

Moreover, this Court has not required an adversary proceeding in which the purported "next friend" is a party. In **Demosthenes v. Baal**, for example, the state court conducted a hearing after Baal expressed his desire to terminate post-conviction proceedings; the opinion indicates that Baal's parents were not parties to or represented at this hearing. **Id.**, No. A-857, slip op. at 2. Although Baal's parents presented evidence of incompetence that had not been considered by the state court, this Court held that it was not "meaningful evidence" that Baal was incompetent and affirmed the federal district court's denial of an evidentiary hearing. Even in situations where the death sentenced inmate contends that he is incompetent to be executed, under **Ford v. Wainwright**, the presumption of correctness attaches to findings made after a hearing that observes basic fairness, i.e., is conducted by an impartial factfinder that receives evidence and argument from the prisoner's counsel. **Id.** at 427, 106 S.Ct. at 2610 (Powell, J.

concurring). In the procedural posture in which this Court finds itself, review of a state collateral proceeding, no less deference should be accorded the trial court's findings.

Second, Hamilton's assertion that the state habeas judge had predetermined the issue of competence is specious. A hearing was conducted on May 17, 1990, to determine whether Smith still desired to forego further appeals. Appendix B, Exhibit D at 2. The judge's statement to Smith that he did not believe Smith was incompetent was not made in a vacuum, but followed the judge's many opportunities to observe Smith and his knowledge of the numerous mental examinations that uniformly revealed Smith to be competent.[7] Indeed, after Smith characterized additional mental examinations as "cover[ing] the bases," the judge noted that he and Smith had covered "so many bases over a period of six years." Id., Exhibit D at 6. The record merely reflects that the judge was careful to note that his decision to order yet another round of examinations was due not to a perception that Smith was incompetent but out of an abundance of caution. Had the court not done so, Hamilton undoubtedly would have alleged that the judge's order of mental status examinations reflected that the judge had

[7]In Justice Powell's concurring opinion in **Ford**, 477 U.S. at 426 106 S.Ct. at 2610, he noted that states may properly employ a presumption that a death sentenced inmate, who has been found competent or whose competence has previously been conceded, remains competent at the time of execution.



questions about Smith's competence or that Smith must have manifested signs of incapacity not apparent from the cold record.[8]

Third, Hamilton's claim that the state impermissibly withheld "exculpatory" evidence of Smith's alleged incompetence is plainly without merit. At the outset, Hamilton cannot demonstrate harm because she presented the allegedly withheld evidence to the state courts, which considered it and found it insufficient to raise a **bona fide** issue of incompetence. Moreover, Hamilton fails to show that the Florida medical reports (Hamilton's Exhibit 10),[9] which she presented, constituted information within the prosecution's knowledge or that the state even had legitimate access to the reports. Hamilton's Exhibit 10 consists of letters, some of which are titled "PRIVILEGED AND

[8]Consistent with the vitriolic tenor of her pleadings, Hamilton refers to the mental health experts who examined Smith as "employ[ees] of the executive branch," describing wording on the letterhead of their stationary "The Mental Health and Mental Retardation Authority for Harris County" as a "flagstaff." **See** Petition at 6 & n.5. In fact, the Mental Health and Mental Retardation Authority of Harris County, which provides psychiatric services to county inmates, is a county department which is overseen by the Texas Department of Mental Health and Mental Retardation, and is hardly an arm of the prosecution. Drs. Jaime Ganc and Jerome Brown are private practitioners, who contract with MHMR-Harris County to treat county prisoners. Indeed, Dr. Brown testified for Johnny Paul Penry, and his testimony forms the factual basis for this Court's decision in **Penry v. Lynaugh**, ___ U.S. ___, 109 S.Ct. 2934 (1989). Without Dr. Brown, the state submits that Hamilton's current counsel, the Texas Resource Center, would be unable to make the unending **Penry** claims she makes here and in other actions.

[9]Respondent is designating Hamilton's exhibits, as numbered and appended to her state application for habeas corpus relief, which has been filed as an exhibit in this cause.

CONFIDENTIAL," written to a Florida public defender who represented Smith in connection with a 1978 robbery prosecution. Hamilton has not shown that these reports were made a part of a public record so as to remove them from the aegis of Smith's attorney client privilege. Indeed, an examination of the top of the pages comprising Hamilton's Exhibit 10 reveals a "header" produced by telefax transmittal that reflects that the documents were obtained from the Public Defender's office. This unfounded attack can only reflect Hamilton's awareness of the weakness of her position.

**B. The record demonstrates that Smith is competent to elect to forego further appeal; hence, Hamilton's attempt to intervene must be dismissed.**

To establish standing, Hamilton must show that Smith lacks the competence to elect to forego further appeal. A person seeking to litigate as the "next friend" of another has the burden "clearly to establish" his status. **Whitmore v. Arkansas**, ___ U.S. ___, ___, 110 S.Ct. 1717, 1727 (1990); **see also Lenhard v. Wolff**, 443 U.S. 1306 (1979); **Evans v. Bennett**, 440 U.S. 1301 (1979); **Gilmore v. Utah**, 429 U.S. 1012 (1976). "[O]ne necessary condition for 'next friend' standing in federal court is a showing by the proposed 'next friend' that the real party in interest is unable to litigate his own cause due to mental incapacity." **Whitmore**, ___ U.S. at ___, 110 S.Ct. at 1728; **Gilmore v. Utah**, 429 U.S. at 1012. Where an evidentiary hearing demonstrates that the defendant has knowingly, intelligently, and voluntarily decided to forego further challenges to his



conviction, a purported "next friend" cannot establish standing. **Demosthenes v. Baal**, No. A-857, slip op. at 4, **citing Whitmore**, ___ U.S. at ___, 110 S.Ct. at 1728.

In this context, the standard for competence is whether the real party in interest suffers "from a mental disease, disorder, or defect that substantially affect[s] his capacity to make an intelligent decision." **Whitmore**, ___ U.S. at ___, 110 S.Ct. at 1728, **citing Rees v. Peyton**, 384 U.S. 312, 314 (1966); **accord Rumbaugh v. Procunier**, 753 F.2d 395, 398 (5th Cir.), **cert. denied**, 473 U.S. 919 (1985).

**Whitmore** and **Baal** merely reaffirm this Court's well-established rule regarding competency. In **Rees v. Payton**, 384 U.S. 312 (1966), a state inmate sentenced to death filed a petition for writ of certiorari to review the court of appeals decision affirming the denial of habeas corpus relief. Rees withdrew the petition before any action was taken, having determined to forego further review of his case. This Court, in "aid of the proper exercise of [its] certiorari jurisdiction," ordered the federal district court to make a judicial determination of Rees' competence, specifically, "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." **Id.** at 313. The Court supported its order by citing as analogous the provisions of 18 U.S.C. §§4241-4247, which authorize psychiatric or psychological examinations in the

district courts for criminal defendants whose competency to stand trial is in issue. Whether an examination is called for under §4241 is a matter entrusted to the discretion of the court "to determine if there is reasonable cause to believe that the defendant may be incompetent." **United States v. Partin**, 552 F.2d 621, 635 (5th Cir.) (quoting **United States v. Hall**, 523 F.2d 665, 667 (2d Cir. 1975)), **cert. denied**, 434 U.S. 903 (1977); **see also Hammett v. Texas**, 448 U.S. 725 (1980) (inmate allowed to withdraw pro se his certiorari petition with no inquiry into competence where counsel failed to question the client's competence); **Lenhard v. Wolff**, 603 F.2d 91, 93 (9th Cir. 1979) ("Some minimum showing of incompetence must appear before a hearing is necessary.")[10]

This Court has identified three factors which have been found to be relevant in assessing competency to stand trial: (1) the existence of a history of irrational behavior, (2) prior psychiatric opinion, and (3) the defendant's demeanor at trial. **Drope v. Missouri**, 420 U.S. 162, 180 (1975). Likewise, when a court must determine whether to grant a stay of execution based upon the filing of a "next friend" petition, the Court and Justice Rehnquist, acting as Circuit Justice, have articulated factors which are relevant to the determination of whether the "next friend" has made a sufficient demonstration that the death sentenced inmate is incompetent to waive judicial review.

In terminating the stay of execution in **Gilmore v. Utah**, 429 U.S. at 1012, Chief Justice Burger, with whom Justice Powell joined, concurring, found the state's determination of Gilmore's competence to waive his right to direct appeal and any further judicial review to be firmly grounded in the record. Chief Justice Burger looked to Gilmore's own expressions of his choice, the psychiatric examinations conducted prior to his trial, and the psychiatric reports prepared by the prison psychiatrist and psychologists after Gilmore had made his decision to forego further judicial review. **Id.** at 1015 n. 4&5.

In **Evans v. Bennett**, 440 U.S. 1301 (1979), **stay vacated**, 440 U.S. 987 (1979), Justice Rehnquist, acting as Circuit Justice for the First Circuit, granted a stay of execution after having concluded that there existed a probability that four members of the Court would vote to grant the requested relief. However, Justice Rehnquist noted that had he been casting his vote as a Member of the full Court, he would vote to deny the stay. He found correct the district court's determination that Evans' "next friend"

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[10]Smith's attempt to distinguish **Demosthenes v. Baal** on the basis that Dr. Carbonnel, who did not examine Smith, nonetheless renders an opinion that Smith was not competent, whereas the non-examining psychiatrist in **Baal** opined that Baal "may" have been incompetent, is unavailing. The determination of a threshhold showing of doubt of competency does not hinge on the utterance of "magic words" but on reliability of information. Here, Carbonnel's diagnosis of current psychosis, based on review of 1978 reports of a "psychotic break" which never recurred and that was of such a temporary nature that a state court released Smith to out-patient treatment and lay opinions by persons with a vested interest in a stay of execution, pales in comparison with the numerous current opinions from 1983 to present by disinterested mental health experts, coupled with the trial court's unique position of observing Smith in the courtroom. **Compare Rees v. Peyton**, 384 U.S. at 313 (Judicial determination of competence required when, after recent examination, psychiatrist filed detailed report concluding petitioner incompetent).

lacked standing. The only evidence of incompetency presented by the "next friend" was an affidavit of a psychiatrist who stated that Evans refused to be examined and who concluded from conversations with other individuals that Evans was not able to make a rational decision. The rebuttal evidence which Justice Rehnquist and the district court found to be persuasive of competency to make a rational choice was that: (1) Evans had been evaluated prior to trial and was determined fit to stand trial; (2) there was no evidence of any intervening physical or mental disability arising between the time of trial and the filing of the petition and, (3) at no time prior to the filing of the petition had Evans' competency been questioned. Both courts found unpersuasive the argument that the choice of death over continued confinement was evidence of irrationality. **Id.** at 1303-05.

In **Lenhard v. Wolff**, 443 U.S. 1306 (1979), **stay vacated**, 444 U.S. 807 (1979), Justice Rehnquist took the same position taken in **Evans**. Lenhard, a public defender, filed a next friend petition on behalf of Jesse Bishop, a death sentenced inmate. Agreeing with the lower court's determination that the "next friend" had demonstrated insufficient evidence of Bishop's incompetence to waive further judicial review, Justice Rehnquist noted that Bishop had been found competent at the time of trial to plead guilty after an evidentiary hearing at which three examining psychiatrists reported that Bishop was competent. Justice Rehnquist further noted that there had been "no subsequent judicial determination of his competency to waive further



litigation," but that a state-appointed psychiatrist had found Bishop competent based upon a four-hour interview. **Id.** at 1311-12.

In summary, this Court's decisions hold the following:

> (1) A "next friend" petitioner lacks standing to intervene where the death sentenced inmate is competent to waive judicial review.
>
> (2) The burden is on the "next friend" petitioner to prove the death sentenced inmate's incompetence.
>
> (3) The "next friend" petitioner must present sufficient evidence to raise a bona fide and reasonable doubt as to the defendant's incompetence.
>
> (4) Based upon the **Gilmore**, **Evans**, and **Lenhard** decisions of the Supreme Court, the following factors are relevant to a determination of whether a death-sentenced inmate is competent to waive judicial review:
>
> (A) The inmate's expression of his desire to waive judicial review.
>
> (B) Psychiatric determinations made prior to trial.
>
> (C) Evidence of any intervening physical or mental disability arising between the time of trial and the filing of the "next friend" petition.
>
> (D) Psychiatric determinations made subsequent to the death-sentenced inmate's election to waive judicial review.

The state submits that the analytical framework set forth by the Fifth Circuit is appropriate in this case:

> This test requires the answer to three questions:

(1) Is the person suffering from a mental disease or defect?

(2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?

(3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?

If the answer to the first question is no, the court need go no further, the person is competent. If both the first and second questions are answered in the affirmative, the person is incompetent and the third questions need not be addressed. If the first question is answered yes and the second is answered no, the third question is determinative; if yes, the person is incompetent, if no, the person is competent.

**Rumbaugh v. Procunier**, 753 F.2d at 398-99. The record overwhelmingly demonstrates that Smith is competent, under the **Rumbaugh** standard, to decide whether to forego post-conviction attacks on his conviction and sentence.

Hamilton's petition utterly fails to demonstrate that Smith is incompetent to forego further judicial review of his death sentence, or that an examination is necessary to determine his competence. Moreover, "next friend" clearly has not made a sufficient threshold showing of incompetence to warrant a hearing. In support of her assertion of Smith's incompetence, "next friend" asserts: (1) he was hospitalized for psychiatric evaluation in 1972 while in the Navy; (2) he was found not guilty of robbery in Florida by reason of insanity in 1978; (3) he



attempted suicide in Louisiana in 1981, and after being recaptured in an escape attempt during his capital murder trial; (4) he was in a car accident and later fell in a Houston bank, supposedly injuring his head; (5) he has equivocated in the past about pursuing an appeal; (6) his mother noticed a change in his attitude, attributed in her opinion to an alleged "stroke" he suffered in 1986; and (7) an opinion by an individual with a masters degree in psychology that Smith's "stroke" must have caused neurological damage and that persons with suicidal ideation typically have "limited intellectual focus, or narrowing of mental faculties."

The competency standard set forth by this Court is a factual one. Accordingly, a state court's determination of competency is entitled to a presumption of correctness under 28 U.S.C. § 2254(d) if the finding is fairly supported by the record, **Demosthenes v. Baal**, No. A-857, slip op. at 4 (June 3, 1990), **citing Maggio v. Fulford**, 462 U.S. 111, 117, 103 S.Ct. 2261, 2264 (1983), and must be accorded proper deference in these proceedings. **See Wainwright v. Witt**, 469 U.S. 412 (1985) (Trial court findings of juror bias entitled to presumption of correctness in habeas proceedings and "great deference" on direct appeal). In the instant case, the state habeas court conducted a hearing by receiving evidence and arguments from the state and Hamilton. **See e.g., McCoy v. Lynaugh**, 874 F.2d 954, 960-661 (5th Cir.), **stay denied**, ___ U.S. ___, 109 S.Ct. 2114 (1989); **Evans v. McCotter**, 805 F.2d 1210 (5th Cir. 1986); **see also Ford v.**

**Wainwright**, 477 U.S. at 426-27 (Powell, J., concurring)[11] (ordinary adversarial procedures, including live testimony, cross-examination, and oral argument are not necessary ingredients of hearing regarding competency for execution, and presumption of correctness is applicable to findings made by a neutral fact finder after receiving the prisoner's evidence and arguments). Thereafter, the court made factual findings regarding Smith's competency and answered negatively all three questions set forth by the Fifth Circuit in **Rumbaugh**. These findings are supported by the record, and are dispositive of Hamilton's claims in this Court.

Smith has been examined four times during the last six years, and on all occasions, he has been found competent: (1) in June 1983 by Dr. Nottingham, M.D., psychiatrist, and Dr. Brown, Ph.D., clinical psychologist, Appendix B, Exhibit G; (2) in February 1984 by Dr. Nottingham and Dr. Brown, **id.**; (3) in April 1988 by Dr. Blevins, Ph.D., clinical psychologist, and Dr. Morgan, Ph.D., correctional psychologist, **id.**, Exhibit H; and (4) in May 1990 by Dr. Ganc, M.D., psychiatrist, and Dr. Brown, **id.**, Exhibits E and F, respectively. Dr. Ganc's report, **id.**, Exhibit E, is based upon an examination of Smith conducted on May 18, 1990, and contains the following observations:

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[11]Justice Powell's concurrence is the law of **Ford** in the sense that it is the narrower of the two opinions holding that the execution of the insane violates the Eighth Amendment. Only three Justices joined Justice Marshall's lead opinion.



> Mr. Smith discussed the charge of Capital Murder as well as the circumstances leading up to his arrest in a logical, coherent and relevant fashion.
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> * * *
>
> He was able to discuss the function of the defending attorney, the judge, the jury and the district attorney. He has sufficient understanding of the criminal justice system. He is very clear about his present legal situation and the fact that he can appeal at any moment that he desires to do so. He was clear about the fact that he is on death row. He knows the options available to him at the present time.
>
> * * *
>
> He expresses himself in a logical, coherent and relevant fashion. There is no evidence of any psychotic thinking. There is no auditory or visual hallucinations. His thinking was well organized. There was no loosening of associations. His affect was appropriate. He was oriented to person, place and time. His cognitive functioning was intact.

Dr. Jerome Brown's most recent report, **see** Appendix B, Exhibit F, also based on a May 18, 1990 examination of Smith, provides an even more detailed account of Smith's own statements during the examination. Dr. Brown's report makes clear that Smith is aware of his legal options; understands that foregoing further appeals will result in his execution; knows why the death sentence was imposed; and even knows how the execution will be carried out. Dr. Brown, like Dr. Ganc, concludes that Smith does not suffer from a mental illness or defect at the present time and that he has sufficient capacity to make a rational decision concerning whether to continue or abandon future appeals. These reports, along with Smith's conduct, statements, and demeanor before the

habeas court, amply support the habeas court's finding that Smith is currently competent to decide his own fate.[12]

Moreover, the record amply supports the habeas court's determination that the affidavits of Hamilton, Dale Piper, Eden Harrington, and trial counsel Randy McDonald, along with twelve-year-old medical reports, were insufficient to cast doubt upon the findings of examining experts Dr. Ganc and Dr. Brown or to raise a question regarding Smith's competency.

The state habeas court correctly determined that the reports from mental examinations conducted in 1978 were too remote to be beneficial. **State v. Smith**, No. 375813 at 7, Finding 24. Hamilton quarrels with that determination by claiming that in 1985 Smith was found incompetent to forego appeals or proceed **pro se**. Hamilton badly misrepresents the record, because the trial court made no determination of Smith's mental capacity. Rather, the trial court found Smith incompetent to represent himself because he sought to proceed **pro se** in order to abandon his appeal or file a brief claiming no grounds of error. Under Texas law, appeal from a conviction of capital murder and sentence of death

[12]Hamilton's attempt to infer present mental defect from Smith's having been found not guilty by reason of insanity twelve years ago is unavailing. The order of acquittal directs Smith to seek treatment on an out-patient basis, thus indicating the Florida court's impression that Smith's impairment at the time of acquittal, if any, was not severe. Moreover, if Smith had some impairment in 1978, it was not present in 1983 and 1984, when he was evaluated at the time of trial, in 1988, when he was evaluated by Department of Corrections mental health professionals, nor at present, when he was evaluated by Drs. Ganc and Brown.



is mandatory. Tex. Code Crim. Proc. Ann. art. 37.071(h) (Vernon Supp. 1990) ("[t]he judgment of conviction and sentence of death **shall be subject to automatic review**"). Smith had absolutely no right to abandon an appeal, and his avowed intent to do so would have disrupted the appellate process in a manner akin to a defendant who disrupts a trial by outbursts or an intentional failure to follow courtroom procedures. The trial court's action to prevent Smith from circumventing the statute was entirely proper, **see Faretta v. California**, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 2541 n.46 (1975), and does not undermine the trial court's findings of competence.[13]

After considering the evidence and arguments presented by the state and Hamilton and his own observations of Smith, the state habeas court found that Smith knows that his execution is approaching and the reason for the execution; that Smith does not now suffer from any mental disease or defect; and that Smith understands his legal position and the options available to him and demonstrates the ability to make a rational choice among those options. Appendix B at 6, Findings 20-22. Further, the state habeas court correctly determined that the evidence presented by Hamilton was insufficient to require an additional examination or hearing. **Id.** at 7-8, Findings 24-28. **See**

[13]Neither does the trial court's action transform Dr. Carbonnel's opinion into anything other than an aberration from the reports of all mental health experts who have examined Smith in the last seven years.

**Demosthenes v. Baal**, No. A-857, slip op. at 5 (finding that federal district court correctly denied evidentiary hearing where "next friend" presented no "meaningful evidence" of incompetency). The record fully supports the findings and conclusions of the state habeas court.

There is no evidence in this record that Smith is incompetent to elect to forego collateral review. Nor has Hamilton raised any **bona fide** doubt as to Smith's competency. The assertion that the election to forego further avenues of relief is, in and of itself, evidence of incompetency has been rejected by Justice Rehnquist:

> The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the **summum bonum**, a prosposition with respect to which the greatest philosophers and theolgoians have not agreed and with respect to which the United States Constitution by its terms does not speak.

**Lenhard v. Wolff**, 443 U.S. at 1312-13, 100 S.Ct. at 7.

Further as stated by Circuit Judge Sneed in his concurrence in **Lenhard v. Wolff**, 603 F.2d 91, 94:

> I am convinced that Bishop is sane and that he has made a knowing and intelligent choice to forego his federal remedies. It is difficult for me to imagine that I would make a similar choice were I in his position. What I might do, however, is not the test. Bishop is an individual who, for reasons I can fathom only slightly, has chosen to forego his federal remedies. Assuming his competence, which on this record I must, he should be free to so choose. To deny him that would be to incarcerate his spirit-the one that that remains free and which the state need not and should not imprison.



Finally, as eloquently stated by Smith, himself:

> The attempts at next friend intervention have not been an aid to the implementation of justice. Rather, what they have produced ranges from the travesty of **Gilmore v. Utah**, to the horror of **Rambaugh v. Estelle**. Claiming concern for the accused such parties swagger forth at the last moment under the banner of humanism thinking they have warrant. In their hubris the person and rights they claim to be concerned for they depreciate and traumatize.

**See** Appendix B, Exhibit B. There is absolutely no evidence indicative of any mental disease or defect in this case. Rather, "next friend" utilizes conjecture based upon stale and unreliable evidence coupled with dilatory tactics in an effort to obtain a stay of execution where none is deserved or desired. To allow "next friend" to succeed would merely serve the purposes of those whose philosophical views oppose the death penalty while at the same time forcing Smith to endure the mental anguish associated with further delay.

## CONCLUSION

For the foregoing reasons, the state respectfully requests that the application for stay of execution be denied.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

ALEXZENE HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND TO JAMES EDWARD SMITH *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 89-7838. Decided October 9, 1990

The motion of Chris Lonchar Kellogg for leave to intervene is denied. The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, concurring.

I agree with JUSTICE STEVENS that the issue raised in this petition is important and merits resolution by this Court. I write to express my frustration with the Court's failure to avail itself of the ordinary procedural mechanisms that would have permitted us to resolve that issue in *this* case.

It is already a matter of public record that four Members of this Court voted to grant certiorari before petitioner was executed. See *Hamilton* v. *Texas*, 497 U. S. —— (1990) (Brennan, J., dissenting from denial of application for stay). According to established practice, this fact should have triggered a fifth vote to grant petitioner's application for a stay of his execution.* Indeed, this result flows naturally from the

*See *Autry* v. *Estelle*, 464 U. S. 1, 2 (1983) *(per curiam)* ("Had applicant convinced four Members of the Court that certiorari would be granted on any of his claims, a stay would issue"); *Darden* v. *Wainwright*, 473 U. S. 928, 928–929 (1985) (Powell, J., concurring in granting of stay); *Straight* v. *Wainwright*, 476 U. S. 1132, 1133, n. 2 (1986) (Powell, J., concurring in denial of stay, joined by Burger, C. J., REHNQUIST, and O'CONNOR, JJ.) (noting that "the Court has ordinarily stayed executions when four Members have voted to *grant* certiorari"); *id.*, at 1134–1135 (Brennan, J., dissenting from denial of stay, joined by MARSHALL and BLACKMUN, JJ.) ("[W]hen four vote to grant certiorari in a capital case, but there is not a fifth vote to stay the scheduled execution, one of the five Justices who does not believe the case worthy of granting certiorari will nonetheless vote to stay; this is so that the 'Rule of Four' will not be rendered meaningless by an execution that occurs before the Court considers the case on the merits").

standard by which we evaluate stay applications, a central component of which is "whether four Justices are *likely* to vote to grant certiorari." *Coleman* v. *Paccar*, 424 U. S. 1301, 1302 (1976) (REHNQUIST, J., in chambers) (emphasis added); see also *Maggio* v. *Williams*, 464 U. S. 46, 48 (1983) *(per curiam)* (same).

In my view, the Court's willingness in this case to dispense with the procedures that it ordinarily employs to preserve its jurisdiction only continues the distressing rollback of the legal safeguards traditionally afforded. Compare *Boyde* v. *California*, 494 U. S. ——, —— (1990) (MARSHALL, J., dissenting) (criticizing diminution in standard used to assess unconstitutional jury instructions in capital cases); *Barefoot* v. *Estelle*, 463 U. S. 880, 912–914 (1983) (MARSHALL, J., dissenting) (criticizing Court's endorsement of summary appellate procedures in capital cases); *Autry* v. *McKaskle*, 465 U. S. 1085, 1085–1086 (1984) (MARSHALL, J., dissenting from denial of certiorari) (criticizing expedited consideration of petitions for certiorari in capital cases).

# SUPREME COURT OF THE UNITED STATES

## ALEXZENE HAMILTON *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 89-7838. Decided October 9, 1990

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring.

This petition for a writ of certiorari raises important, recurring questions of law that should be decided by this Court. These questions concern the standards that the Due Process Clause of the Fourteenth Amendment mandates in a hearing to determine whether a death row inmate is competent to waive his constitutional right to challenge his conviction and sentence and whether he has made a knowing and intelligent waiver of this right.

James Edward Smith was convicted of murder and sentenced to death in Harris County, Texas, in 1984. Smith had a substantial history of mental illness, and his mental difficulties prompted a finding by the Texas trial court that he was not competent to represent himself on appeal. Pet. for Cert., Exh. 2, p. 13, Exhs. 4–8, 10–12. After his conviction, Smith vacillated between forceful insistence on prosecuting his own appeal and equally forceful insistence on abandoning any challenge to his conviction or his sentence. Pet. for Cert., Exh. 2, pp. 10–11, Exh. 11, p. 2.

Petitioner is Smith's natural mother. Proceeding as Smith's "next friend," she attempted to establish her standing to litigate on her son's behalf and to have his execution stayed until his competence was established after a full adversarial hearing. She was unsuccessful. On May 23, 1990, without notice to petitioner, the Texas trial court held a nonadversarial hearing, made a finding that Smith was com-

petent to make a decision regarding his execution, and set his execution for 12:01 A. M. on June 26, 1990. Pet. for Cert., Exh. 3.

On June 22, over the dissent of Justice Teague,[1] the Texas Court of Criminal Appeals dismissed petitioner's "Emergency Application for Stay of Execution and Objections to Trial Court's Prior Proceedings." *Ex Parte Hamilton*, No. 18,380–02 (Tex. Crim. App., June 22, 1990) (en banc) *(per curiam)* (order denying application for stay). On June 24, petitioner filed in this Court her petition for a writ of certiorari and her application for a stay of Smith's execution. Four Members of the Court voted to grant certiorari,[2] and to stay the execution. Nevertheless, the stay application was denied, and Smith was executed on schedule.

Smith's execution obviously mooted this case. The Court has therefore properly denied the petition for a writ of certiorari. This denial, however, does not evidence any lack of merit in the petition;[3] instead, the reason for the denial emphasizes the importance of confronting on the merits the substantial questions that were raised in this case.

JUSTICE SOUTER took no part in the consideration or decision of this motion and this petition.

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[1] "Teague, J., notwithstanding that such might, but probably only will cause a slight delay in carrying out applicant's obvious desire to carry into effect his long held death wish, as well as his strong belief that he will be reincarnated after he is killed, but believing that this Court, at least implicitly, has ruled that in a case such as this one, where the reasonable probability that the defendant is not competent to request that he be put to a premature death, or, to put it another way, to commit legal suicide through the hands of others, has been raised, it is necessary for the trial court to conduct a '*full* adversarial hearing' on the issue. Given the possible favorable evidence now available, a 'full adversarial hearing' should now be conducted in this cause. See Ex parte Jordan, 758 S. W. 2d 250 (Tex. Cr. App. 1988). Also see Ford v. Wainwright, 477 U. S. 399, 106 S. Ct. 2595, 92 L. Ed. 2d 335 (1986)." *Ex Parte Hamilton*, No. 18,380–02 (Tex. Crim. App., June 22, 1990) (Teague, J., dissenting from order denying application for stay).

[2] See *Hamilton* v. *Texas*, 497 U. S. —— (1990) (Brennan, J., dissenting from denial of application for stay).

[3] See *Singleton* v. *Commissoner*, 439 U. S. 940, 942 (1978) (opinion of STEVENS, J., respecting denial of petition for writ of certiorari).